CLOSED
STACKS

SAN FRANCISCO
PUBLIC LIBRARY

GOVERNMENT INFORMATION CENTER
SAN FRANCISCO PUBLIC LIBRARY

REFERENCE BOOK

Not to be taken from the Library

SAN FRANCISCO PUBLIC LIBRARY
3 1223 03475 0126

REF
352.9,Sa52a,JUL-DEC,1955
San Francisco (Calif.)
City Attorney's Office
Official opinions of
the City Attorney of
the

SAN FRANCISCO
PUBLIC LIBRARY

- A -

Year 1955

Opinion No.

ABSENCE of Supervisors from State and Absence of Supervisors from Meetings 984A

AIR Pollution Control District; Procedural Steps for Creation in Bay Area 989

AIR Pollution Control District's Appointment by Mayor and Board of Supervisors; Duties of Members of the Board 988

APPEAL from City Planning Commission Order; Number of Signatures Required; Procedure 984

APPEALS to Board of Supervisors - Appeals re One for One Parking 1015

APPOINTMENT of Coroner 971

APPROPRIATION for Cash Prizes or Trophies 1001

APPROPRIATION Ordinance - Position of Instructor of Nursing 1021

AREAS Designated for Institutional Use - Qualifications for use thereof - Diamond Heights Redevelopment Plan 1026

ASSIGNMENT of Wages by City Employee, Responsibility of Controller on Receipt of notice of 1011

AUTHORITY of Director of Public Works in Re Amounts of Insurance 995

AUTHORITY of Head of Department to Establish Normal Work Week of 5 consecutive days Tuesday through Saturday, Pursuant to Salary Standardization Ordinances 987

AUTHORITY to Grant Power for Removal of Stop Signs in Police Commission 1013

AUTOPSIES Right of Minor Mother to Authorize 978

ADMINISTRATIVE CODE Year 1955

Opinion No.

ADMINISTRATIVE CODE 792 - Rule 11 980

ALL DEPARTMENTS

Year 1955

Opinion No.

TIME off to Vote at General and Special Municipal Elections 1002

ASSEMBLY BILLS Year 1955

Opinion No.

ASSEMBLY BILL #3545, 1955 Legislature 988

ASSESSOR

Year 1955

	Opinion No.
PROFESSIONAL and Business Activities - Hours of Employment	1004A
PURCHASE and Use Tax; Electric Signs Fabricated in Oakland and Installed in San Francisco, Subject to Tax, Nature of Property	980

- B -

Year 1955

Opinion No.

BLOCK Coverage - City Planning, Stipulation Limiting Block Coverage by Improvements, Application to Individual Lots 981

BOARD OF SUPERVISORS, Powers with reference to discontinuance of service 1028

BOARD to Pay out Moneys - Health Service System 1003

BOND for County Hospital Care Rendered Alien 975

BUS Drivers 972

BOARD OF EDUCATION

Year 1955

Opinion No.

CHARTER SECTION 157, Political Activity of Civil Service Employees, Enforcement, Relevancy of Education Code Section 13205 999

HEALTH SERVICE SYSTEM, Eligibility for Membership of Child Care Center Employees of School Department 996

LEGISLATION (Sec. 13205, Education Code) Relating to Political Activities of School Employees, Effect on Civil Service Employees 993

BOARD OF PERMIT APPEALS

Year 1955

Opinion No.

ONE for One Garage Space Proposed Ordinance; Variance Provisions, Appeal to Board of Supervisors, Legality of when New Comprehensive Zoning Ordinance Becomes Effective as Provided in Charter Section 117 — 1015

ROOF-TOP Sign in Violation of Covenant, Power of Board of Permit Appeals and City Planning Commission in Relation thereto; Modification of Stipulations under Planning Code Section 47.1 — 1017

BOARD OF SUPERVISORS

Year 1955

Opinion No.

APPEAL to Board of Supervisors of Rezoning Resolution of City Planning Commission; Procedure of Board on Advice by Director of Public Works of Insufficiency of Signatures to Protest; Time Restriction 984

APPROPRIATION Ordinance Creating Position of Instructor of Nursing, Department of Public Health; Legality of Compensating Occupant of Position at Salary of Position Prior to Effective Date of Ordinance 1021

BAY Area Air Pollution Control District; Mayor's Duty in Re Appointment of Member of Board of Directors; Duties of Member of Board 988

BAY Area Air Pollution Control District, Procedural Steps for and Time for Their Execution; Assembly Bill No. 3545 989

CHARTER SECTION 157, Political Activity of Civil Service Employees, Enforcement, Relevancy of Education Code Section 13205 999

CITY May Require Property Owner to Report upon Condition of Sidewalk Abutting his Property and Particularly upon Defective Condition of Sidewalk 974

CONSTITUTIONALITY of Provision to Require that Coroner be a Physician 971

COUNTY FIRE WARDENS, Application of Chapter 881, Statutes of 1955 (Sec.24008, Government Code) to Local Division of Fire Prevention and Investigation 1010

EFFECT of Article 8, Chapter 5, Part 2, Div. 2, Title 3, Government Code (A.B. 3757, 1955 Legislature) Relating to Real Estate Commissions on Procedure of City and County in Sale and Lease of Real Property 985

EFFECT of 151.3 on the Authority of Civil Service Commission to Certify and Board of Supervisors to Set Wages of Platform Men, Operators and Bus Drivers 972

GAS Tax Funds, Use of, For Construction of Express Ways and Subways Where Designated as Major City Streets 986

LEGISLATION (Sec. 13205, Education Code) Relating to Political Activities of School Employees, Effect on Civil Service Employees 993

BOARD OF SUPERVISORS Year 1955

Continued	Opinion No.
MUNICIPAL RAILWAY Special Shopper's Service; Power of Public Utilities Commission to Discontinue Service; Jurisdiction of Board of Supervisors	1028
ONE for One Garage Space Proposed Ordinance; Variance Provisions, Appeal to Board of Supervisors, Legality of When New Comprehensive Zoning Ordinance Becomes Effective as Provided in Charter Section 117	1015
PROPOSED Amendment to Charter Section 6	984A
RECREATION AND PARK DEPARTMENT, Concession Agreement for Operation of Pony Rides, Without Approval of Supervisors, Legality	1004
RESOLUTION Declaring a Need for the City and County to Exercise the Powers of a Parking Authority (Supervisors File No. 13660) Validity and Legal Implications	994
RETIREMENT PROCEDURE - Ordinance may legally provide that Director of Art Galleries and Museums may withdraw their Contributions to Retirement System within 60 Days Prior to Mandatory Service Retirement and be Re-Employed without Membership in System	971A
SOCIAL Security Coverage for Members of the San Francisco City and County Retirement System, Procedure for; Supplementation or Integration; Necessity of Charter Amendment	976
SONORA Union High School District; Legality of Contribution by City and County of San Francisco	997
TEMPORARY Removal of Stop Signs to Determine Effectiveness, Authority for to Police Commission	1013
VALIDITY of Legislation Permitting Chief Administrative Officer to Continue in Office Beyond Compulsory Retirement Age; Validity of Related Legislation Fixing Age Limit	998
VETERANS' Day Celebration, Legality of Appropriation for Cash Prizes or Trophies	1001

BOARD OF SUPERVISORS - ADMINISTRATIVE RULES Year 1955

Opinion No.

SUPERVISORS Rule Re Necessity for Consent for Absence from Meeting 984A

BUILDING CODE

Year 1955

Opinion No.

990

§§102,104 and 804

- C -

Opinion No.

CAMPAIGN Committees need not file list of Expenditures and Income 1029

CAMPAIGN Statements of Income and Expenditures of Committees Representing Candidates 1029

CARFARE - for Discharged Inmate of County Jail 1020

CELEBRATION Veterans' Day 1001

CERTIFICATION of Wage Schedules 972

CITY CHARTER Section 22 983

CITY Officer - Propriety of Representing Conflicting Interests as Attorney therefor 1005

CITY Retirement System Contributions - Teachers 982

CIVIL Liability of Public Officials for Negligence 1018

CIVIL Service 972

COMPENSATION 1021

COMPENSATION for Entrance H2 Fireman, Fire Department, with Prior Service as H202 Fireman, Salvage Corps 1023

COMMISSIONS Sale or Lease of City and County Owned Real Estate 985

CONCESSION Agreement on Pony Rides; May Approval by Board of Supervisors be treated as a Condition Subsequent? 1004

CONTRIBUTION by CCSF to School District - Sonora Union High 997

CONTROLLER- Responsibility of on Receipt of Notice of Assignment of Wages by City Employees 1011

CONTROLLER'S Right to Audit Health Service Records 1016

COUNTY FIRE WARDENS - Application of Sec. 24008, Government Code, to Local Division of Fire Prevention and Investigation 1010

- C -

Year 1955

Continued

Opinion No.

COUNTY OFFICER - Authority of City and County to Regulate Hours and Employment, by Charter Amendment 1004a

COVENANTS - Roof-Top Sign in Violation of Covenant, Power of Board of Permit Appeals and City Planning Commission in Relation thereto, Modification of Stipulations under Planning Code Section 47.1 1017

COVERAGE - City Planning, Stipulation Limiting Block Coverage by Improvements, Application to Individual Lots 981

COVERAGE of Former Employee based on fact that Retirement System Contributions have not been refunded - Health Service System 1022

CALIFORNIA PALACE OF LEGION OF HONOR Year 1955

Opinion No.

RETIREMENT PROCEDURE - Ordinance May Legally Provide that Director of Art Galleries and Museums May withdraw their Contributions to Retirement System within 60 days prior to mandatory service in Retirement and be Re-Employed without Membership in System 971A

CHARTER SECTIONS

Year 1955

	Opinion No.
§2	1001
§6 (as proposed to be amended in November 1955 election)	984A
§7 - Positions S102 Conductor, S105 Motorman and S106 Bus Operators as Positions requiring Expert or Technical Training	1031
§19(g)	970
§35.9	1010
§39 - Roof-Top Sign in Violation of Covenant, Power of Board of Permit Appeals and City Planning Commission in Relation thereto; Modification of Stipulations under Planning Code Section 47.1	1017
§42 - Government Code §§1953-2002	1025
§86	997
§107 - City May Require Property Owner to Report upon Condition of Sidewalk Abutting his Property and Particularly upon Defective Condition of Sidewalk	974
§117 Appeal to Board of Supervisors of Rezoning Resolution of City Planning Commission; Procedure of Board on Advice by Director of Public Works of Insufficiency of Signatures to Protest; Time Restriction	984
§132.1	1028
§151.3	972
§154	973
§157	993
§158	976
§161	1009
§165.2(a)	1006
§165.2(F)	1007
§172.1 Subdivision 1	996
§172.1	1003

CHARTER SECTIONS

Year 1955

Continued	Opinion No.
§4025 Penal Code	1020
§§5,134,174 and 175	1029
§§11,22,222,223,172.1, 26,140 and 157	1005
§§20,22,172.1,223	983
§§35.5.1,36,36.2,38.1	1023
§§42,92,93 and 123	985
§§42 and 142	1004
§§72,80 and 143	1021
§§91, 93	1024
§§117 and 117.3	1015
§§141, 148 and 154	979
§§147.1 and 141	1019
§§154 and 157	999
§§159,163, 163(b), 165(b), 165.1.1, 165.3.2, 165.2(B), 165.2(f), 1661.8, 168.1.2, 168.1.8, 171.1.8, 172.1	982
§§159,163, 163b, 165b, 165.1, 165.2(b), 165.2(F), 116(a), 168.1.2, 171.1.12, 172.1	1022
§§165 and 165.a(b),(f)	1012
§§165, 165.2	971A
§§165, 165.2,4,2	998
§§172.1 and 19(a)	1030
§§172.1,4,66 and 21	1016
AIR POLLUTION CONTROL Research and Technical Assistance, Public Law 159, 84th Congress	988

CHARTER SECTIONS

Year 1955

Continued

	Opinion No.
AIR POLLUTION CONTROL - Research and Technical Assistance, Public Law 159, 84th Congress	989
CIVIL CODE, Sections 1822-25	969
CODE Civil Procedure, Section 1826	969
GOVERNMENT CODE Sections 27460-27531	969
ORDINANCE 9391 re off street parking space	1033
PURCHASE and Use Tax Ordinance - Section 18.1	980

CHIEF ADMINISTRATIVE OFFICER

Year 1955

	Opinion No.
CONSTITUTIONALITY of Provision to Require that Coroner be a Physician	971
PURCHASE and Use Tax; Electric Signs Fabricated in Oakland and Installed in San Francisco, Subject to Tax, Nature of Property	980
VALIDITY of Legislation Permitting Chief Administrative Officer to Continue in Office Beyond Compulsory Retirement Age; Validity of Related Legislation Fixing Age Limit	998

CITY PLANNING CODE

Year 1955

	Opinion No.
CITY PLANNING CODE, Article 1, Section 3 - Article 1, Section 6, Item 27	1008
§§47 and 48 - City Planning Code (Part 11, Chapter 11, Article 2 - San Francisco Municipal Code)	1032

CITY PLANNING COMMISSION

Year 1955

	Opinion No.
ELIMINATION of Existing Off-Street Parking Space, Effect of Ordinance No. 9391	1033
ROOF-TOP Sign in Violation of Covenant, Power of Board of Permit Appeals and City Planning Commission in Relation thereto; Modification of Stipulations under Planning Code Section 47.1	1017
STIPULATION Limiting Block Coverage by Improvements, Application to Individual Lots	981
ZONING - Appeal to Board of Supervisors of Re-Zoning Resolution of City Planning Commission; Procedure of Board on Advice by Director of Public Works of Insufficiency of Signatures to Protest; Time Restriction	984
ZONING, First Residential District in which a Quarry is Permitted, Can Permit for Construction of Rock Crushing and Screening Plant be Granted as to Same Site	1008

CIVIL SERVICE COMMISSION

Year 1955

Opinion No.

AUTHORITY of Civil Service Commission to Re-Rate Examination Papers after Posting of Tentative List; Section 147.1 of the Charter Reviewed; Rule 12 Civil Service Commission Distinguished 1019

CHARTER SECTION 157, Political Activity of Civil Service Employees, Enforcement, Relevancy of Education Code Section 13205 999

EFFECT of 151.3 on the Authority of Civil Service Commission to Certify and Board of Supervisors to Set Wages of Platform Men, Operators and Bus Drivers 972

LEGALITY of Employment of Unlicensed and Unregistered Physiotherapist in Public Health Department; Malpractice Liability for Such Employment; Removal Procedure 973

LEGALITY of Lay-Off of Employees Due to Reductions in Force on Basis of Departmental or Service-Wide Seniority 979

MUNICIPAL RAILWAY, S102 Conductor and S104 Motorman as Positions Requiring Expert or Technical Training Under Charter Section 7; Residence Requirements of Employees, Waiver of 1031

RATE of Compensation for H2 Fireman who Formerly Served as H202 Fireman, Salvage Corps; Whether Salvage Corps Service is to be Credited in Determining Such Compensation 1023

CIVIL SERVICE COMMISSION RULES AND REGULATIONS Year 1955

	Opinion No.
RULE 12	1019
RULE 26	979
RULE 36	1004A

CONTROLLER Year 1955

Opinion No.

CONTROLLER, Responsibility of on Receipt of Notice of Assignment of Wages by City Employees 1011

HEALTH SERVICE SYSTEM, Duty to Make Available for Controller's Audit Such Records, Including Doctor Bills, as Are Required to Audit the Payments of Medical Benefits Against the Authorized Fee Schedule; Charter Section 172.1 1016

VETERANS' Day Celebration, Legality of Appropriation for Cash Prizes or Trophies 1001

CORONER Year 1955

Opinion No.

CONSTITUTIONALITY of Provision to Require that Coroner be a Physician 971

RELEASE by Coroner of Articles of Personal Property Related to Accidental Deaths taken as Evidence in Course of his Investigation 969

- D -

Opinion No.

DEAD Bodies, Right to Control Disposition of 978

DIAMOND HEIGHTS REDEVELOPMENT PLAN - Areas Designated for Institutional Use - Qualifications for Use thereof 1026

DISCRETIONARY Power Concerning Seniority in Lay Off 979

DURATION of Liability of Sponsor of Alien on Public Charge Bond 975

M.H. deYOUNG MUSEUM

Year 1955

Opinion No.

RETIREMENT PROCEDURE - Ordinance May Legally provide that Director of Art Galleries and Museums may withdraw their Contributions to Retirement System within 60 days prior to mandatory service retirement and be Re-Employed without membership in System 971A

DEPARTMENT OF PUBLIC HEALTH

Year 1955

	Opinion No.
APPROPRIATION, Ordinance Creating Position of Instructor of Nursing, Department of Public Health; Legality of Compensating Occupant of Position at Salary of Position Prior to Effective Date of Ordinance	1021
LEGALITY of Employment of Unlicensed and Unregistered Physiotherapist in Public Health Department; Malpractice Liability for Such Employment; Removal Procedure	973
LIABILITY of Sponsor for Expense of Alien Cared for at County Hospital	975
RIGHT of Unmarried Minor Mother to Authorize Autopsy on Deceased Child	978

DEPARTMENT OF PUBLIC WORKS

Year 1955

Opinion No.

CITY May Require Property Owner to Report upon Condition of Sidewalk Abutting his Property and Particularly Upon Defective Condition of Sidewalk 974

INTERPRETATION of Action of Board of Permit Appeals in Granting Permit for Building During War Emergency; Duty of Department of Public Works 1027

POWER of Director of Public Works to Vacate an Unsafe Building; Sections 102,104 and 604, Building Code 990

PUBLIC Liability and Property Damage Insurance in Re Contracts for Public Works; Requirements as to Subcontractors; Indemnification Provision; Authority of Director of Public Works in Re Amounts of Insurance 995

DEPARTMENT OF PUBLIC WORKS RULES

Year 1955

Opinion No.

§§2(m) and 7(b) of the Standard Specifications of the Department of Public Works	995

- E -

Opinion No.

EFFECT of 151.3 on the Authority of Civil Service Commission to Certify and Board of Supervisors to Set Wages of Platform Men, Operators and Bus Drivers 972

EFFECTIVE date of creation of positions 1021

ELECTRIC Signs 980

ELECTRICAL Signs as Fixtures 980

ELECTRICAL Signs Fabricated in Another County for Use in San Francisco 980

ELEVATED Expressways as Major City Street 986

ELIGIBILITY for Membership in Health Service System 982

EMPLOYEE Former - Coverage - Health Service System 1022

EMPLOYEES - Health Service Board - Employment and Duties 1005

EMPLOYMENT - Lay Offs and Seniority Rule 979

EXEMPT Employees of County Offices, Authority, to Regulate Employment, by Charter Amendment 1004A

EDUCATION CODE	Year 1955 Opinion No.
EDUCATION CODE of the State of California - Section 16251	997
§13205 - Education Code	999

- F -

Year 1955

	Opinion No.
FARES Municipal Railway	1028
FIRE DEPARTMENT: Peace Officers Powers; How Obtained?	1010
FORMER Employee - Coverage - Health Service System	1022
FUNDS - for Cash Prizes or Trophies	1001
FUNDS for Sonora Union High School District	997
FUNDS - Legality of Transfer of - from Medical Surplus Fund to February Medical Fund Authorized thereat - Health Service Board	970

FIRE DEPARTMENT

Year 1955

	Opinion No.
COUNTY FIRE WARDENS, Application of Chapter 881, Statutes of 1955 (Sec. 24008, Government Code) to Local Division of Fire Prevention and Investigation	1010
RATE of Compensation of H2 Fireman who Formerly Served as H202 Fireman, Salvage Corps; Whether Salvage Corps Service is to be Credited in Determining Such Compensation	1023

- G -

Opinion No.

GAS TAX FUNDS - Use of for Construction of Expressways and Subways 986

GAS TAX FUNDS - Use of to Construct Major City Streets 986

GIFTS 1001

GOVERNMENT Code Sections 1953, 1954 (5305) Re Liability of Public Officials 1018

- H -

Opinion No.

HEALTH SERVICE BOARD - Section 22 of the City Charter as Applied to 983

HEALTH SERVICE BOARD - Special Meeting of May 20,1955, Legality of Transfer of Funds from Medical Surplus Fund to February Medical Fund Authorized thereat 970

HEALTH SERVICE SYSTEM - Eligibility for Membership in by Teachers who withdraw their City Retirement System Contributions and Deposit them with State Retirement System 982

HEALTH SERVICE SYSTEM, Eligibility for Membership of Child Care Center Employees of School Department 996

HEALTH SERVICE SYSTEM: Rule 7. Service Extension and Reserve Fund, Effect as to Bills Incurred Contrary to any Plan; Supplement to Opinion No. 1003 1030

HIGHEST Wage Schedule - Municipal Railway 972

HOSPITAL Bill which Private Insurance Company has paid - Health Service System 977

HOSPITALS 978

HOURS of Employment - County Officers 1004A

HEALTH SERVICE BOARD

Year 1955

Opinion No.

COVERAGE of Former Employee by System Based on Fact that Retirement System Contributions have not been Refunded 1022

DUTY to make Available for Controller's Audit Such Records, Including Doctor Bills, as are Required to Audit the Payments of Medical Benefits against the Authorized Fee Schedule; Charter Section 172.1 1016

ELIGIBILITY for Membership in by Teachers who withdraw their City Retirement System Contributions and Deposit them with State Retirement System; Effect of Withdrawals by Employees Generally 982

HEALTH Service Board, Authority to Pay Claims not in Accord with any Adopted Plan 1003

HEALTH Service Board, Propriety of Representation before Board of Director of Board of Health Service Employees Respecting their Employment and Duties; Letters as Threats Contrary to Section 650, Penal Code 1005

HEALTH Service Board, Special Meeting of May 20,1955, Legality of Transfer of Funds from Medical Surplus Fund to February Medical Fund Authorized thereat 970

HEALTH Service System, Eligibility for Membership of Child Care Center Employees of School Department 996

HEALTH Service System; Rule 7, Service Extension and Reserve Fund, Effect as to Bills Incurred Contrary to any Plan; Supplement to Opinion No. 1003 1030

LEGALITY of Paying Plan 1 Member Amount of Hospital Bill which Private Insurance Company has Paid 977

SECTION 22 of the City Charter as Applied to the Health Service Board and the Members thereof with Relation to the Health Service System Functions and Office Administration 983

HEALTH SERVICE SYSTEM - RULES AND REGULATIONS

Year 1955

	Opinion No.
§7 of Rules and Regulations of Health Service System	1030
§13 of Part 111, of Plan 1 of Health Service System	977
§983 of Rules and Regulations of Health Service System	983
§§48-54 of Rules and Regulations of Health Service System	982

HETCH HETCHY Year 1955

Opinion No.

SONORA Union High School District; Legality of Contributions by City and County of San Francisco 997

- I -

Opinion No.

ILLEGITIMATE, Minors, Autopsies Minors 978

IN Disregard of Terms of Plan 1 1003

INDEMNIFICATION Provision - Insurance - Public Works 995

INDIVIDUAL Liability of Commissioners 1025

INTERPRETATION of Action of Board of Permit Appeals in Granting Permit for Building During War Emergency; Duty of Department of Public Works 1027

INTERPRETATION of Deed, granting property to be used as a Public Park and for no other purpose 1000

INTERPRETATION of Education Code Sec. 19611.3 and Sec.165.2 of our Charter as to Credit for "prior service" for Child Care Center Employees under our Retirement System 1006

- J -

Opinion No.

JURISDICTION 1028

JUVENILE Probation Committee, Authority to Negotiate Lease of Property 1024

Year 1955

Opinion No.

KEY Cannot be Changed after rating of Examination 1019

- L -

Opinion No.

LAY OFFS due to reductions in force according to departmental or service wide seniority 979

LEASE of Log Cabin Ranch Property 1024

LEGALITY 1021

LEGALITY of Paying Plan 1 Member Amount of Hospital Bill which Private Insurance Company has paid 977

LEGALITY of Transfer of Funds - Health Service Board 970

LEGALITY of Variance Appeals to Board of Supervisors Instead of Board of Permit Appeals - Parking 1015

LIABILITY of Public Officials for Negligence Performance or Non-Performance of Ministerial Duties 1018

LIABILITY of Sponsor on Public Charge 975

LOG CABIN RANCH Property, Ownership 1024

- M -

Opinion No.

MAY School Teacher whose date of compulsory retirement has passed receive a refund of accumulated contributions from Retirement System in Lieu of Retirement Allowance 1012

MOCCASIN Children re Transportation to School 997

MUNICIPAL Affair, Inapplicability of State Law 985

MUNICIPAL Affair, State Legislation inapplicable to Local Fire Rules and Regulations 1010

MUNICIPAL Election - Time off to Vote 1002

MAYOR

Year 1955

	Opinion No.
BAY Area Air Pollution Control District; Mayor's Duty in Re Appointment of Member of Board of Directors; Duties of Member of Board	988
BAY Area Air Pollution Control District, Procedural Steps for and Times for Their Execution; Assembly Bill No. 3545	989

MUNICIPAL RAILWAY

Year 1955

Opinion No.

EFFECT of 151.3 on the Authority of Civil Service Commission to Certify and Board of Supervisors to Set Wages of Platform Men, Operators and Bus Drivers 972

MUNICIPAL RAILWAY, S102 Conductor and S104 Motorman as Positions Requiring Expert or Technical Training Under Charter Section 7; Residence Requirements of Employees, Waiver of 1031

MUNICIPAL RAILWAY Special Shopper's Service; Power of Public Utilities Commission to Discontinue Service; Jurisdiction of Board of Supervisors 1028

TIME off to Vote at General and Special Municipal Elections 1002

- N -

Opinion No.

NECESSITY for Dismissal of Permanent Civil Service Employee for Failure to Qualify to Engage in Practice of Physiotherapy under State Law 973

NECESSITY for Registration or Licensing pursuant to State Law 973

NON-CONFORMING Use - Operation of Rock Crushing Plant as Unlawful Extension of 1008

- O -

	Opinion No.
OFF-STREET Parking; Does Ordinance #9391 prohibit Elimination of Existing Off-Street Parking Space in Dwelling Units?	1033
OFFICE Administration - Functions - Health Service System	983
ONE for One Garage Space Ordinance; Legality of Variance Appeals to Board of Supervisors instead of Board of Permit Appeals	1015
OPERATORS Municipal Railway	972

ORDINANCES

Year 1955

Opinion No.

ORDINANCE No. 1599 970

- P -

Opinion No.

PARKING Space Ordinance: Legality of Variance Appeals to Board of Supervisors instead of Board of Permit Appeals - Variances re One for One Parking 1015

PERMIT for Building During War Emergency - Public Works 1027

PERSONAL Liability of Commission for Injuries sustained on Park Property 1025

PHYSICIAN and Surgeon as Coroner 971

PHYSIOTHERAPISTS, Application of State Law (Bus. and Prof. Code, Secs. 2600-2694) to City Employed 973

PLATFORM Men Municipal Railway 972

PLAN 1 - Health Service System 977

PLANNING Roof-Top Sign in Violation of Covenant, Power of Board of Permit Appeals and City Planning Commission in Relation thereto; Modification of Stipulations under Planning Code Section 47.1 1017

PLANNING Stipulation Limiting Block Coverage by Improvements, Application to Individual Lots 981

POLITICAL Activities of Civil Service Employee - Effect of Sec. 13205 Education Code 993

POLITICAL - Activity, Civil Service Employees (a) Prohibition of - (b) Enforcement of Prohibition of Civil Service Employees, Political Activity 999

PONY RIDE CONCESSION: Legality without approval of Board of Supervisors 1004

POSITIONS Creation of 1021

POWER of Board of Supervisors to prescribe a mandatory retirement age after exclusion from Charter Requirement for Mandatory Retirement 998

POWER of Health Service 1003

POWER of Public Utilities Commission to Discontinue Service on Municipal Railway Line 1028

POWERS of Parking Authority - Resolution Declaring Need for City to Exercise 994

- P - Year 1955

Continued Opinion No.

PRIZES or Trophies 1001

PROCEDURE for Creation of Positions 1021

PROCEDURE to dismiss permanent Civil Service Employee for Failure to Qualify to perform Services regulated by State Law 973

PROFESSIONAL and Business Activities - Assessor 1004A

PROPERTY held by Coroner 969

PROPERTY Owner - City may require Property Owner to report upon Condition of Sidewalk abutting his property and particularly upon defective condition of sidewalk 974

PROPOSED Amendment to Charter Section 6 (For Nov. 1955 Election) 984A

PUBLIC LIABILITY ACT OF 1923 - City May Require Property Owner to Report upon Condition of Sidewalk Abutting his property and particularly upon defective condition of sidewalk 974

PUBLIC Liability and Property Damage Insurance in Re Contracts for Public Work; Requirements as to Subcontractors; Indemnification Provision; Authority of Director of Public Works in Re Amounts of Insurance 995

	Opinion No.
COUNTY FIRE WARDENS, Application of Chapter 881, Statutes of 1955 (Sec. 24008, Government Code) to Local Division of Fire Prevention and Investigation	1010
POWER to Enact Ordinance Under Vehicle Code Section 595.1 to Tow Away Automobiles Illegally Parked on Grades	1014
TEMPORARY Removal of Stop Signs to Determine Effectiveness, Authority for to Police Commission	1013

PUBLIC UTILITIES COMMISSION

Year 1955

	Opinion No.
EFFECT of 151.3 on the Authority of Civil Service Commission to Certify and Board of Supervisors to Set Wages of Platform Men, Operators and Bus Drivers	972
EFFECT of Article 8, Chapter 5, Part 2, Division 2, Title 3, Government Code (A.B. 3757, 1955 Legislature) Relating to Real Estate Commission on Procedure of City and County in Sale and Lease of Real Property	985
MUNICIPAL RAILWAY Special Shopper's Service; Power of Public Utilities Commission to Discontinue Service; Jurisdiction of Board of Supervisors	1028
SONORA Union High School District; Legality of Contribution by City and County of San Francisco	997

- Q -

Opinion No.

QUALIFICATION of County Coroner 971

QUALIFICATION of County Officers 971

QUARRY - Operation of rock crushing plant in, when quarry is district zoned first residential 1008

- R -

Opinion No.

RAIL or bus fare supplied to discharged inmates of County Jail 1020

RANGE Scale Wage Increments as Applicable to Service in a Particular Position Classification 1023

RATES Municipal Railway 1028

RATES of Pay - Municipal Railway 972

RE- Rating of Examination Paper after Posting of Eligible List 1019

REAL ESTATE - Sale or Lease by City and County 985

RECREATION AND PARK COMMISSION: Personal Liability of Commissioners operating Concession without Approval of Board of Supervisors 1004

REDEVELOPMENT PLAN for Diamond Heights; Owners Participation on Condition of Sale to Agency of Portion of Land at Fair Market Value as Established by Agency - Validity of Condition 991

REDEVELOPMENT PLAN for Diamond Heights - Right of Owners of Unimproved Parcels to Participate where lot lines change, Streets are installed, etc. Redevelopment Agency's Powers in formulating plans 992

REFUND from Retirement System - Health Service System 1022

REGULATION thereof as matter of "statewide concern" rather than "Municipal Affair" 973

RELEASE of Property Held by Coroner 969

REPRESENTATION Before Board - Health Service 1005

REQUIREMENTS as to Subcontractors - Public Liability and Property Damage Insurance Re Contracts for Public Work 995

RESERVE Fund - Service Extension and - Health Service System 1030

RESIDENCE Requirements of Employees, Waiver of under Charter Section 7 1031

RESIDENTIAL District - Operation of rock crushing asphalt in District Zoned 1008

- R -

Year 1955

Continued

Opinion No.

RESPONSIBILITY of Public Officials for Accidents and Like Incidents occurring on Premises under their control 1018

RIGHT of Temporary Employee to Retirement Credit (under 1942 Amendment to Section 222, Part 1, Municipal Code) while in Military Service; Right also to "prior service" credit for time absent from city service - while in Military Service 1009

ROCK Crushing Plant - Operation of in District Zoned First Residential 1008

RECREATION AND PARK COMMISSION

Year 1955

	Opinion No.
CONCESSION Agreement for Operation of Pony Rides, without Approval of Supervisors, Legality	1004
EFFECT of Article 8, Chapter 5, Part 2, Div. 2, Title 3, Government Code (A.B. 3757, 1955 Legislature) Relating to Real Estate Commissions on Procedure of City and County in Sale and Lease of Real Property	985
HUNTINGTON SQUARE, Legality of Use of Subsurface Area for Public Parking Facility; Supplemental to Opinion No. 3883, Dated December 2,1946.	1000
MAY Members of Recreation and Park Commission be Liable as Individuals for Damages by Anyone suffering injury on Property under Jurisdiction of the Commission	1025

REAL ESTATE DEPARTMENT Year 1955

Opinion No.

EFFECT of Article 8, Chapter 5, Part 2, Div. 2, Title 3, Government Code (A.B. 3757, 1955 Legislature) Relating to Real Estate Commissions on Procedure of City and County in Sale and Lease of Real Property 985

REDEVELOPMENT AGENCY

Year 1955

	Opinion No.
DIAMOND HEIGHTS Redevelopment Plan, Qualification, for Utilization of Area Designated for Institutional Use, of a Private Nonprofit Fraternal Association	1026
REDEVELOPMENT AGENCY; Validity of Agreement with to Apply for Zone Change and, if Granted, to Apply for Change Back after Certain Construction Permitted under the First Change of Zone	1032
REDEVELOPMENT Plan for Diamond Heights; Owner Participation on Condition of Sale to Agency of Segment or Portion of His Property at Fair Market Value as Established by Agency, Validity of Condition	991
REDEVELOPMENT Plan for Diamond Heights - Rights of Owners of Unimproved Properties to Participate in Redevelopment where Lot Lines Change, Streets are Installed, Grading is Necessary, etc. - Redevelopment Agency's Powers in Formulating Plans	992

REGISTRAR OF VOTERS Year 1955

Opinion No.

CAMPAIGN Statements of Committees Representing Candidates
in the General Municipal Election of November 8,1955;
No Necessity for Filing 1029

RETIREMENT SYSTEM

Year 1955

	Opinion No.
APPLICATION to Temporary Employee of Retirement Amendment (Sec.222, Part 1, Municipal Code), Effective September 14,1942 on Military Leave at such Time; Right to Credit for Prior Service	1009
EFFECT of Education Code Section 19611.3 as to Retirement Credit for Prior Service by Child Care Center Employees before Membership in the San Francisco Employees' Retirement System without Contributions therefor by Said Employees; Necessity of Action by Board of Supervisors	1006
MAY School Teacher whose date of Compulsory Retirement has passed Receive a Refund of Accumulated Contributions in Retirement System in Lieu of Retirement Allowance	1012
RETIREMENT PROCEDURE - Ordinance may legally provide that Directors of Art Galleries and Museums May Withdraw their Contributions to Retirement System within 60 days prior to Mandatory Service Retirement and be Re-employed without Membership in System	971A
RETIREMENT SYSTEM; Validity of Election to Allow Contributions to Remain under Charter Section 165.2, Subd. F, Executed after Termination of Employment in Department of Electricity, but while a Teacher in San Francisco Unified School District; Present and Future Rights under Subd. F; Harold L. Gerber	1007
SOCIAL Security Coverage for Members of the San Francisco City and County Retirement System, Procedure for; Supplementation or Integration; Necessity of Charter Amendment	976
VALIDITY of Legislation Permitting Chief Administrative Officer to Continue in Office Beyond Compulsory Retirement Age; Validity of Related Legislation Fixing Age Limit	998

- S -

Opinion No.

SALARY 1021

SALE of Electrical Signs after Installation under Rental Agreement 980

SCHOOL Department Child Care Center Employees, Eligibility for Membership in Health Service System 996

SECTION 22 of the City Charter as Applied to the Health Service Board and the Members thereof with Relation to the Health Service System Functions and Office Administration 983

SECTION 650 Penal Code - Letters as Threats Contrary to 1005

SENIORITY in Civil Service 979

SERVICE Discontinuance of - Shopper's Shuttle 1028

SERVICE EXTENSION and Reserve Fund - Health Service System 1030

SHERIFF Welfare Fund 1020

SHOPPER'S Special Service - Municipal Railway 1028

SIDEWALKS - City May Require Property Owner to Report upon Condition of Sidewalk Abutting his Property and Particularly upon Defective Condition of Sidewalk 974

SOCIAL Security Coverage for Members of the San Francisco City and County Retirement System, Procedure for; Supplementation or Integration; Necessity of Charter Amendment 976

SONORA Union High School District 997

SPECIAL Meeting, Legality of when defectively noticed 970

STATUTORY Construction, State Law Pertaining to Municipal Affair 985

STIPULATION Limiting Block Coverage by Improvements, Application to Individual Lots 981

STIPULATIONS - Entered under Planning Code §471 - Roof-Top Sign in Violation of Covenant, Power of Board of Permit Appeals and City Planning Commission in Relation thereto; Modification of Stipulations under Planning Code Section 47.1 1017

- S -

Continued — Opinion No.

STREET Railway Systems 972

STREETS - City May Require Property Owner to Report upon Condition of Sidewalk Abutting his Property and Particularly upon Defective Condition of Sidewalk 974

SUBWAY as Major City Street 986

SUPPLEMENT to Opinion No. 3883 - Use of Huntington Square 1000

SAN FRANCISCO HOSPITAL Year 1955

Opinion No.

RIGHT of Unmarried Minor Mother to Authorize Autopsy on Deceased Child 978

SAN FRANCISCO MUNICIPAL CODE Year 1955

Opinion No.

SECTIONS 35-37 of Part 1 of the San Francisco Municipal Code 970

Opinion No.

EFFECT of Education Code Section 19611.3 as to Retirement
Credit for Prior Service by Child Care Center
Employees before Membership in the San Francisco
Employees' Retirement System without Contributions
therefor by said Employees; Necessity of Action
by Board of Supervisors 1006

SHERIFF Year 1955

Opinion No.

SHERIFF Prisoners' Welfare Fund, Use for Local Carfare on Discharge of Prisoners, Also for Rail or Bus Fare to Home in California (Sec. 4025, Penal Code) 1020

- T -

Opinion No.

TEACHERS - Health Service System 982

TEMPORARY Removal of Stop Signs in Traffic Studies 1013

TIME OFF to Vote, Municipal Election 1002

TORT Liability, Consent as a Defenset 978

TORT - Liability of Public Officials 1018

TOW Away Powers of Police Re Vehicles Parked on Hill 1014

TRANSPORTATION of Students to High School 997

TRAINING Expert or Technical, Positions S102 Conductor, S104 Motorman and S106 Bus Operator as Requiring Within Meaning of Charter Section 7 1031

TAX COLLECTOR

Year 1955

Opinion No.

PURCHASE and Use Tax; Electric Signs Fabricated in Oakland and Installed in San Francisco, Subject to Tax, Nature of Property 980

- U -

Year 1955

Opinion No.

UNSAFE - Building, Vacation of - Power of Director of Public Works Procedure for 990

USE of Subsurface area of Huntington Square for Public Parking Facility 1000

- V -

Opinion No.

VALIDITY of Agreement with, to apply for zone change, and if granted, to apply for change back after construction permitted under first change of zone 1032

VALIDITY of Election to allow contributions to remain under Charter Section 165.2 Subd. F when executed; (1) While still employed as a miscellaneous member of the Retirement System, or (2) more than 90 days after last termination of service with School District 1007

VALIDITY of proposed ordinance excluding CAO from requirement for Mandatory Retirement by providing for non-membership in Retirement System 998

VETERANS' DAY Celebration 1001

- W -

Year 1955

Opinion No.

WAGE Schedules 972

WAR Meaning of Terms "duration of war", and "termination of emergency" 1027

WITHDRAWALS from Retirement System - Eligibility in Health Service System 982

WAR MEMORIAL Year 1955

Opinion No.

WAR Memorial Board of Trustees, Personal Liability of Members Arising from Accidents on War Memorial Premises; Liability of Public Officers for Negligence, Non-Performance or Negligent Performance of Ministerial Duties; Tort Liability of Public Officers; Government Code Section 1953, 1954 and 53051 1018

WAR Memorial Management's Right to Establish Normal Work Schedule for Janitors for Five Consecutive Days Commencing Tuesday and Ending on Saturday 987

YOUTH GUIDANCE CENTER Year 1955

Opinion No.

LOG CABIN RANCH Property, Ownership; Juvenile Probation Committee, Authority to Negotiate Lease of Property 1024

- Z -

Opinion No.

ZONING Appeal to Board of Supervisors of Rezoning Resolution of City Planning Commission; Procedure of Board on Advice by Director of Public Works of Insufficiency of Signatures to Protest: Time Restriction 984

ZONING - Operation of Rock Crushing Plant in District Zoned First Residential 1008

OPINION NO. 969

July 6, 1955

SUBJECT: RELEASE BY CORONER OF ARTICLES OF PERSONAL PROPERTY RELATED TO ACCIDENTAL DEATHS TAKEN AS EVIDENCE IN COURSE OF HIS INVESTIGATION.

Dear Sir:

We have your request for an opinion as follows:

REQUEST

> "In the course of investigating certain accidental deaths we have occasion to take as evidence certain articles or apparatus related to the incident. Usually, these are not of particular value and they remain in our possession. Occasionally they are of considerable value and will be claimed by the rightful owners (if borrowed or rented or used in the course of employment), or they may be claimed by the heirs.
>
> "At times there is question of faulty operation or construction of the piece of equipment and it is evident that a civil suit will ensue and both parties to the suit want to examine or have tests made.
>
> "Please advise
>
> 1. Should I release these items on demand of the rightful owner or heir.
> 2. If I am advised by you to hold them in view of forthcoming civil litigation, to whom should I release them and on whose authority."

OPINION

It is obvious that the functions and duties of a coroner do not contemplate his retention of any property either belonging to the deceased or others. Government Code §§27460-27531 set forth the duties of a coroner.

In a routine matter where no criminal elements are involved and where the body of the deceased is taken charge of by the coroner under §27460, the sections of the Government Code immediately following thereon specifically set forth the rights and duties of

the coroner in handling and distributing personal property of the decedent, particularly property found on the body of said deceased. It is a matter of note that the District Attorney is authorized to proceed against the coroner within 40 days after an inquest if, as a matter of fact, the coroner has not divested himself of all the property in his possession which belonged to said deceased. See §27467 Gov. Code.

Property other than that belonging to the deceased is most likely to come into the hands of a coroner in those cases where the possibility of a crime having been committed is present. As the court said in Mar Shee vs. Maryland Assurance Co., 190 Cal. 1, there is no question of the authority of a coroner to hold an inquest for the primary purpose of securing information for the use of those who are charged with the detection and prosecution of crime. When a coroner's inquest has indicated the possibility of a crime, specific notice should be brought to the attention of the District Attorney that the coroner is in possession of property which may be material in the prosecution of such crime and request the District Attorney to proceed by proper writ to take possession of such property.

Where, however, there is no likelihood whatever of criminal procedure being instituted the coroner should, where possible, forthwith divest himself of all property relevant to the case. He has no interest whatsoever in the outcome of any civil matter which may arise concerning such property or in any civil matter stemming from the death of said deceased.

That property which has come into the coroner's possession from a third party will ordinarily have been delivered to the coroner to be held as a mere depositary. The obligations of the depositary are set forth in Civil Code §§1822 et seq. Where the coroner has no notice that any other than the person who has made the deposit has, or claims, an interest in said property, he should, under §1822 of the Civil Code, re-deliver such property to the depositor.

Where a party other than the person who originally deposited the property with the coroner makes claim upon the coroner for such property the depositor should be notified immediately under §1825 of the Civil Code. If the claimant sufficiently establishes his right to such property and if the depositor thereof agrees to the relinquishing of such property to such claimant, the coroner should immediately transfer the property to the claimant.

If the depositor refuses to accede to the right of the claimant, then the coroner under §386 of the Code of Civil Procedure should bring an action in the Superior Court against the conflicting claimants to compel them to interplead and litigate their several claims. The pertinent part of said §386 reads as follows:

> ". . . And whenever conflicting claims are or may be made upon a person for or relating to personal property, or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims. The order of substitution may be made and the action of interpleader may be maintained, and the applicant or interpleading party be discharged from liability to all or any of the conflicting claimants, although their titles or claims have not a common origin, or are not identical but are adverse to and independent of one another. . . ."

Even where there has been no claim by a party other than the depositor, the coroner, where he believes the property in his possession in truth belongs to another, should give such other person notice of the deposit under §1826 of the Civil Code and should forthwith follow and be governed by the wording of such Code, to wit:

> ". . . and if within a reasonable time afterwards he does not claim it, and sufficiently establish his right thereto, and indemnify the depositary against the claim of the depositor, the depositary is exonerated from liability to the person to whom he gave the notice, upon returning the thing to the depositor, or assuming, in good faith, a new obligation changing his position in respect to the thing, to his prejudice. (Enacted 1872)"

If, under said §1826, such ostensibly true owner does not claim such property the coroner should return the same to the depositor.

You are advised accordingly.

Respectfully submitted,

DION R. HOLM
City Attorney

TO: Henry W. Turkel, M.D.
Coroner, City and County
of San Francisco
650 Merchant Street
San Francisco 11

DJK/TMO'C

OPINION NO. 970

July 7, 1955

SUBJECT: HEALTH SERVICE BOARD, SPECIAL MEETING OF MAY 20, 1955, LEGALITY OF TRANSFER OF FUNDS FROM MEDICAL SURPLUS FUND TO FEBRUARY MEDICAL FUND AUTHORIZED THEREAT

Dear Sir:

I have your request for my opinion as to whether the special meeting of the Health Service Board held on May 20, 1955, was legal. More specifically you wish to know whether the authority for the bookkeeping transfer of funds which was given at said meeting (see below) was valid.

Documents you attach show that on May 17, 1955, a written notice bearing the printed signature of Philip P. Engler as President was sent to each member of the Health Service Board by regular mail. The notice reads:

> "May 17, 1955
>
> "NOTICE OF SPECIAL MEETING
> HEALTH SERVICE BOARD
> Friday, May 20, 1955
> at 12 o'clock Noon
> in the offices of the Health Service System.
>
> "A Special Meeting of the Health Service Board is called for noon on Friday, May 20:
>
> "1. To elect a President of the Board for the coming year and
>
> "2. To authorize transfer of funds to cover deficit in February Medical Fund and release February Medical Disbursements.
>
> "PHILIP P. ENGLER, President."

The Board's minutes state that the meeting was called "pursuant to due notice" and that all members of the Board but one answered the roll call. You attach a communication from the absent member stating, "I was notified about the special meeting of the Health Service System to be held at noon on Friday, May 20, 1955. I also want it known that, so far as I'm concerned, any and all business transacted at said meeting was legal. I have no protest to make now, nor did I intend doing so at any time."

I assume this communication means that this member received prior written notice of the meeting.

The business transacted at the meeting was that stated in the notice: (1) A president of the Board was by a vote of 5-3 elected for the ensuing year. (2) An accounting transfer of funds, in order to make medical disbursements, was authorized by a vote of 6-2. These disbursements were to pay doctors and hospitals for services rendered to members of the System and to reimburse members of the System for medical services for which they had paid directly. The making of these disbursements had already been approved at a meeting duly held on April 28, 1955. The legality of that meeting is not questioned. The bookkeeping transfer of funds authorized was as follows:

TRANSFERRED FROM		TRANSFERRED TO		EXPLANATION
960.000.00	$9,795.54	$9,795.54	960.000.02-55	To transfer from Medical Fund Surplus to cover deficit in February Medical Fund.

OPINION

In Opinion No. 817, dated March 30, 1954, I concluded that Government Code §§ 54950 - 54958 applied to meetings of the various boards, commissions and agencies of the City and County.

Government Code §§ 54951, 54952 and 54956 provide that a special meeting may be ordered at any time by the presiding officer of a board of a city and county "by delivering . . . by mail written notice to each member and to each local newspaper of general circulation, radio, or television station requesting notice in writing. Such notice must be delivered personally or by mail at least 24 hours before the time of such meeting as specified in the notice. The order shall specify the time and place of the special meeting and the business to be transacted."

Your letter and the documents you attach do not indicate that any newspaper or radio or television station had submitted to

the Board a written request for notice of the Board's special meetings. Absent such request there is no duty to give such notice. The notice of the Board's meeting of May 20, 1955, therefore, conformed to Government Code § 54956.

This leaves for consideration only the question whether the transfer of funds was illegally authorized because the meeting was not noticed as required by Ordinance No. 1599. See §§ 35, 36 and 37 of Part I of the San Francisco Municipal Code. This ordinance, adopted pursuant to Charter § 19(g), requires a notice of a special meeting of a city board to be delivered personally or to be mailed to each member thereof by special delivery mail and to be posted "upon the door of the office or place of business of said board or commission, or in a conspicuous place within said office," at least twenty-four (24) hours in advance of said meeting.

The notice of the May 20 meeting did not conform to this ordinance. Notice of the meeting was not posted. Two questions are thus presented: (1) Is the ordinance requirement for a posted notice valid in view of the state law? (2) If so, does the failure to post a notice on the office door of the Health Service System render illegal the authorization for the transfer of funds?

In answer to question 1, the applicable legal principle is that where the Legislature intends a state law to cover an entire field and to leave no room therein for additional municipal regulation, a city ordinance imposing additional regulations is invalid. Absent such intent, reasonable ordinances in keeping with the purpose of the general law and supplementary thereto, are valid. (Nat. Milk etc. Assn. v. San Francisco, 20 Cal. 2d 101, 110; Pipoly v. Benson, 20 Cal. 2d 366, 370-371)

The question is therefore one of legislative intent.

The Legislature has declared that Gov. Code §§ 54950 - 54957 "shall apply to the legislative body of every local agency notwithstanding the conflicting provisions of any other state law." (Gov. Code § 54958) But it has not stated that state law shall supplant local ordinances imposing reasonable requirements additional to those of state law, where compliance with such requirements is consonant with the Legislature's declared intent that actions of local boards "be taken openly and that their deliberations be conducted openly." (Gov. Code § 54950) The additional requirement of a posted notice is reasonable and carries out that intent.

In my opinion it was not the intent of the Legislature to nullify, or to prevent enactment of, an ordinance providing for a posted notice of a special meeting. Hence Ordinance No. 1599, insofar as it so provides, is valid notwithstanding state law contains no such requirement.

Preliminary to answering question 2, comment should be made on the requirement of Gov. Code § 54956 that "such notice must be delivered personally or by mail at least 24 hours before the time of such meeting," and the somewhat different requirement of Ordinance No. 1599 that "said notice shall be personally served on each member of said board or commission or mailed to him by special delivery United States Mail, at least 24 hours in advance thereof." If in fact the board member receives the written notice at least 24 hours before the meeting, the notice is valid irrespective of whether it was delivered personally, by mail, or by special delivery mail. See Hopkins v. MacCulloch, 35 C.A. 2d 442, 451. See also Bradley v. Board of Zoning Adjustment, 255 Mass. 160, 150 N.E. 892, 897, col. 2, stating: "If notice actually had been received seasonably, it well might be that the particular method of service would be a matter of indifference." Each board member received seasonable written notice in this case. Hence the notice was not invalid because sent by regular mail.

It is noted that Ordinance No. 1599 only requires that notice be "mailed" by special delivery at least 24 hours in advance of the special meeting, while Gov. Code § 54956 requires that the notice be "delivered" by mail at least 24 hours before the meeting. The requirement of Gov. Code § 54956 is stricter than that of Ordinance No. 1599 in this respect. A notice mailed by special delivery, but not delivered, 24 hours before the meeting would comply with Ordinance No.1599 but not with Gov. Code § 54956. In this situation Gov. Code § 54956, in my opinion, would control to the exclusion of the less stringent provision of the ordinance.

Left for consideration is the effect upon the authorization of the lack of a posted notice of the meeting. In order to comply with the law, notice should have been posted and laxity in this regard cannot be condoned. Under the peculiar facts here presented, however, the failure to post the notice did not invalidate the approval of the bookkeeping transfer because the Board had no discretion to do anything but approve such transfer. It was a mandatory, ministerial act. The obligations were overdue and payable. The Board had duly approved their payment at its April 28 meeting. The money to meet the obligations was in the treasury. All that held up their payment was a bookkeeping charge to the Medical Surplus Fund

and a credit to the February Medical Fund. I have been furnished with no facts which would have justified the Board in withholding authority from the Controller to make this transfer. Had the Board refused to authorize the transfer, in my opinion the Superior Court on proper application would have ordered the Board to approve the transfer forthwith. (Scannell v. Murphy, 82 C. A. 2d 844, 850; Tevis v. San Francisco, 43 C. 2d 190, 198, 200)

The courts have not nullified, and in my opinion would not nullify, acts of this nature because taken at a special meeting defectively noticed. Two examples of the type of action which has been nullified will make this clear. (1) In City of Orange v. Clement, 41 C. A. 497, the city's board of trustees, at a special meeting, resolved to purchase for a certain price certain land for a city hall site, a matter obviously calling for the exercise of considerable discretion. No written notice of the special meeting was delivered to any of the five members of the board, and one of the members was absent from the meeting. Held: the proceedings taken at the meeting were void for failure to comply with Cal. Stats. 1883, p. 268, requiring that a written notice be delivered to each member at least three hours before a special meeting. (2) In Baumgardner v. City of Hawthorne, 104 C. A. 2d 512, four of the five city councilmen met, signed a written call and waiver of notice of special meeting, and thereupon adopted a motion ordering the city manager to discharge Baumgardner from his permanent civil service position of chief of police which he had held for 13 years. Baumgardner was not served with written charges. The fifth councilman was not given notice of the special meeting, did not consent to it, and was not present thereat. Held: the special meeting was illegal and the action of the four councilmen a nullity because, among other reasons, of noncompliance with Gov. Code § 36806 requiring the delivery of written notice of a special meeting to each councilman at least 3 hours before the meeting.

I believe it obvious that the Orange and Hawthorne decisions, supra, are not controlling in the instant case, and that it would be an abuse of judgment to try to apply them to the instant case so as to render invalid the approval of the transfer of funds.

You are advised that in my opinion the approval of the bookkeeping transfer given at the special meeting of May 20, 1955, was valid and legal under the facts of this case.

Respectfully submitted,

GEB/TJB

DION R. HOLM, City Attorney

To: Harry D. Ross, Controller
109 City Hall
San Francisco 2

OPINION NO. 971
July 7, 1955

SUBJECT: CONSTITUTIONALITY OF PROVISION TO REQUIRE THAT CORONER BE A PHYSICIAN.

Gentlemen:

This office is in receipt of a request for opinion as follows:

REQUEST

"In an opinion dated May 5, 1954 /sic. No. 337-A/, concerning the qualifications of the Coroner and the method by which to require that the Coroner must be a licensed physician, you held that to accomplish this would require a constitutional amendment. In a former opinion, referred to by the Chief Administrative Officer in a request, to which your opinion no. 643 is responsive, on the question of the authority of the Chief Administrative Officer to supervise and control the duties of the Coroner you held:

> 'In the charter the authority to establish the duties for the position of coroner has been placed in the Chief Administrative Officer (§60 of the charter). These duties must of necessity be in conformity with the provisions of the Government Code dealing with the responsibility and power of the coroner, but may also contain such other duties as the Chief Administrative Officer in his opinion deems necessary for the proper administration of the office or department placed under his charge.'

"By direction of Supervisor Harold S. Dobbs I am writing to you to explore this matter further and to seek additional opinion and advice.

"Supervisor Dobbs is interested in your opinion to the Chief Administrative Officer, excerpt of which appears above, to the effect that the Chief Administrative Officer may require performance by the occupant of the Coroner's office in the City and County of San Francisco such duties, additional to and in conformity with those required by the provisions of the Government Code, as he (the Chief Administrative Officer) in his opinion, deems necessary for the proper administration of the office or department placed under his charge.

"Supervisor Dobbs is aware of the fact that the procedure for amendment of the constitution is cumbersome, time-consuming and, in the case of a proposal such as is here involved, of

questionable success, and he desires to be informed whether there is available some more facile procedure through which it can be assured that the office of Coroner in the City and County of San Francisco shall always be occupied by a licensed physician, capable, himself, of performing autopsies and such other functions and duties as only a licensed physician may perform.

"If the Chief Administrative Officer, has, in his discretion, the right to designate the duties of the Coroner in the City and County of San Francisco, consistent with the provisions of the Government Code, is it legal and proper to require, either through enactment of an ordinance or ratification of a charter amendment that the Chief Administrative Officer must appoint as Coroner, one who is a physician, licensed to practice in the State of California under the laws of the State of California, in order to assure that regardless of who may occupy the position of Chief Administrative Officer, the office of Coroner shall always be occupied by a licensed physician?"

OPINION

While it may appear from the portions of my Opinions Nos. 837-A and 643 quoted in your request that some inconsistency exists, I believe that when the problem which was covered by these opinions is understood the advice contained therein will be clarified and any apparent conflict explained.

Opinion No. 643 is one in a series of opinions that was asked in order that the respective duties of the Civil Service Commission and the Chief Administrative Officer might be clarified and delineated as to the filling of the position of coroner. Opinion No. 837-A on the other hand dealt with the problem of the legality of changing the qualifications of a county officer by statute or Charter amendment and in this change setting up limitations as to who could be made eligible for appointment to this position.

Under the laws of the State of California there is no question that where a coroner is appointed or elected in a county he is a county officer (Government Code §24,000). Since he is a county officer, in order to determine what authority, if any, a chartered city might have concerning his position, it is necessary to refer to the Constitution on this subject. The State Constitution, in Article XI, Section 8½, provides that:

> "It shall be competent in any charter framed in accordance with the provisions of this section, or Section 8 of this article, for any city or consolidated city and county, and plenary authority is hereby granted, subject only to the restrictions of this article, to provide therein or by amendment thereto, the manner in which, the method by which, the times at which, and the terms for which the several county and municipal officers and employees whose compensation is paid by such city or city and county, excepting judges of the superior court, shall be elected or appointed, . . . "

In carrying out this power the people of the City and County of San Francisco in adopting their Charter have provided for the appointment of the coroner pursuant to the Civil Service provisions of the Charter. Accordingly, a coroner is appointed by the Chief Administrative Officer after he has been certified as an eligible from an eligible list by the Civil Service Commission. It was under these circumstances that Opinion No. 643 was written, with the view in mind that the Civil Service Commission classifies positions in accordance with duties assigned by the head of the department. Consequently, at the time Opinion No. 643 was written there was a conflict existing between two departments and I was called upon to advise each of them as to respective rights. At no time during the course of the discussion concerning Opinion No. 643 was I asked nor did I advise any department that they could set the qualifications of county officers. My opinion still is as set forth in Opinion No. 837-A that it is not possible to provide for these qualifications by either a Charter amendment or an ordinance of the Board of Supervisors. The only method by which the proposal that you desire could be accomplished is by an amendment to the State Constitution, providing therein that a charter may contain a provision for setting the qualifications of county officers.

Respectfully submitted,

DION R. HOLM
City Attorney

BJW/WFB

TO: Board of Supervisors
235 City Hall
San Francisco 2

Attention: Mr. John R. McGrath
Clerk of the Board

No. 971-A

July 8, 1955

Honorable Judiciary Committee
of the Board of Supervisors
235 City Hall
San Francisco 2, California

Dear Sirs and Madam:

At the meeting of your committee held on July 7, 1955, you had under consideration File No. 13344, a proposed ordinance amending Section 221, Subdivision (c), Part I of the Municipal Code. The purpose of the amendment is to add a second proviso to the proviso allowing attorneys and physicians employed in non-civil service positions who resign and withdraw their contributions from the Retirement System within sixty days of the date of mandatory service retirement to be subsequently appointed to non-civil service positions in their professional capacities without the requirement of membership in the Retirement System. The second proviso, the subject of the amendment under consideration, would extend the same privilege and exemption to persons occupying the position of director of any art gallery or memorial museum of the city and county. This amendment was drafted in this office and is, in my opinion, both valid legally and expressed in proper terminology to accomplish the purpose stated.

As to the legality of the amendment, I call attention first to Opinion No. 561 issued by this office on June 17, 1952, in which your Honorable Board was advised that the first proviso herein referred to, relating to attorneys and physicians, is valid. This opinion was given careful consideration before it was issued and has been given some further consideration in the office in connection with the subject proposed amendment. You will note that the opinion finds that the Board of Supervisors has power to make classifications with respect to inclusion or exclusion from the Retirement System and further finds that the classification made by the ordinance then under consideration was a legally reasonable one such that its adoption would be a proper exercise of the legislative discretion of the Board. In my opinion, the classification presently proposed, relating to persons occupying the position of

director of an art gallery or memorial museum of the city and county, is likewise a legislatively reasonable classification within the broad discretion possessed by the legislative body of the city and county with reference to municipal affairs. The fact that such a director may have some duties which are administrative rather than purely and exclusively professional does not seem to me to be of sufficient importance to alter this conclusion.

Mention was made at the public hearing conducted by your committee on the above date of a paragraph contained in Subdivision (A) of Section 165.2. You will note that this paragraph was discussed in the opinion of this office to which I have referred. Mention was also made of the beginning language of Section 165.2, "Miscellaneous Officers and Employees" with the contention that this language was all inclusive except for the specific exemptions referred to in the section of persons employed on a part-time, temporary or substitute basis and of members of the fire and police departments. It is to be noted, however, that the term "miscellaneous officers and employees" is qualified by the language as defined in this section. In the paragraph referred to, "miscellaneous officers and employees" as used in this section is indicated to mean any officer or employee not a member of the fire or police departments in the sense that the expression, officer or employee, is used in Section 165 of the Charter. The reference to Section 165 of the Charter does not relate to members of the fire and police departments, which membership, for the purposes of the Retirement System, is defined elsewhere in the Charter. In Section 165 of the Charter sweeping language is used with reference to the entire Retirement System in stating that the System shall be applied to such offices, departments, bureaus, or classes of officers or employees of the city and county, including teachers in the San Francisco school department, as the supervisors shall determine. The language used in Section 165.2, later enacted, does not repeal or modify this language but, on the contrary, specifically refers to it and incorporates it in effect in Section 165.2.

The above comments of a general nature are included in this letter because of the request of the chairman of your committee for both a statement in writing of the City Attorney as to the validity of the subject amendment for record purposes of the committee and a comment upon the provisions of Section 165.2 which were referred to in the course of the public hearing.

As to the proviso relating to attorneys and physicians, I may further call to your attention that that legislation was not proposed by this office nor has any member of this office taken

advantage of its provisions. The sole contact of this office with that amendment has been to exercise its required function of advising your department, at your request, on its legality. That advice I have here confirmed and now give you the same advice affirmatively as to the legality of the subject proposed amendment, File No. 13344.

Yours truly,

DION R. HOLM
City Attorney

WP/WFB

OPINION NO. 972

July 18, 1955

SUBJECT: EFFECT OF 151.3 ON THE AUTHORITY OF CIVIL SERVICE COMMISSION TO CERTIFY AND BOARD OF SUPERVISORS TO SET WAGES OF PLATFORM MEN, OPERATORS AND BUS DRIVERS.

Gentlemen:

This office is in receipt of a request for an opinion from your office as follows:

REQUEST

> "Attached hereto please find communication from the Civil Service Commission relating to a review of the wage schedules in effect on July 1, 1955, for operational employees on street railway systems in California municipalities of 100,000 or more population.
>
> "This review is made pursuant to the provisions of Section 151.3, preliminary to fixing wage schedules for the employees referred to.
>
> "On Page 2 of the communication from the Civil Service Commission, in Paragraph 2, you will note the recommendation of the Civil Service Commission that the Board of Supervisors request the City Attorney for an opinion as to whether the highest wage schedule in effect on the Key System on July 1, 1955 under the facts recited therein, and as the term 'wage schedule' is defined in section 151.3 of the charter, is $1.91 per hour for 2-men car operations; or whether the highest wage schedule in effect on July 1, 1955 is a wage schedule of $1.91 per hour effective July 1, 1955 to March 1, 1956 and $1.95 per hour to be effective March 1, 1956 and $1.98 per hour to be effective December 1, 1956.
>
> "I have been directed to request that you furnish an opinion such as is recommended be sought by the Civil Service Commission and that such opinion be submitted to the Finance Committee for its consideration at its regular meeting on Wednesday, July 13, 1955."

OPINION

A reading of Section 151.3 of the Charter, insofar as it applies to the wages of the various classifications of employment of platform employees, coach and bus operators of the Municipal

Railway, states that they ". . . shall be determined and fixed annually. . ."

Since this section provides that the act of the Board of Supervisors in setting the wages shall be performed annually only that portion of the wage schedule which is being paid during the annual period in question, in this case the fiscal year commencing July 1, 1955 and ending June 30, 1956, can be considered. Consequently the $1.98 rate which will not be paid by the Key System until December 1, 1956 must be disregarded and not considered in the deliberation of the Board of Supervisors in setting the wage schedule for 2-man car operation under the provisions of Section 151.3.

The wage schedule as certified, after disregarding the December 1, 1956 rate of $1.98 and the period from July 1, 1956 to December 1, 1956, shows that the highest wage schedule in effect on July 1, 1955 is a wage schedule that provides for the payment of $1.91 per hour commencing July 1, 1955 to and including February 29, 1956 and for the payment of $1.95 per hour for balance of the fiscal year ending June 30, 1956. Both of these rates are part of the highest wage schedule certified as being in effect. The Board of Supervisors, therefore, under the authority of Section 151.3 may adopt the schedule as certified and provide in the ordinance that the payments to be made thereunder shall commence on the dates set forth therein. This action of the Board of Supervisors would be in keeping with that portion of Section 151.3 which reads as follows:

> "(B) The board of supervisors shall thereupon fix a wage schedule for each classification of platform employees and coach and bus operators of the municipal railway which shall be not in excess of the highest wage schedule so certified by the civil service commission for each such classification."

You are advised accordingly.

Respectfully submitted,

DION R. HOLM
City Attorney

TO: Board of Supervisors
235 City Hall
San Francisco 2, California
Attn.: John R. McGrath
Clerk of the Board

TJB/BJW

OPINION NO. 973

July 18, 1955

SUBJECT: LEGALITY OF EMPLOYMENT OF UNLICENSED AND UNREGISTERED PHYSIOTHERAPIST IN PUBLIC HEALTH DEPARTMENT; MALPRACTICE LIABILITY FOR SUCH EMPLOYMENT; REMOVAL PROCEDURE.

Dear Sir:

I have received your recent communication asking my advice concerning the present employment in the San Francisco Hospital of a physiotherapist who occupies her position under permanent civil service appointment and who has not sought registration or licensing pursuant to the requirements of the Business and Professions Code, Sections 2600 to 2694. In connection therewith, you have requested my opinion on the following questions:

> "(1) Is the Department of Public Health and the institutions which operate under the Director of Public Health violating the provisions of the Business and Professions Code by employing the Physiotherapist at the San Francisco Hospital who has neither licensed nor registered under the provisions of this act?
>
> "(2) If a person employed by this department is not registered or licensed, is the department assuming increased medical or malpractice liability by continuing such person in employment?
>
> "(3) If it is ruled that any person employed by the department as a Physiotherapist must be licensed or registered, is it necessary to take steps to remove such person under Section 154 of the Charter and if so, what would be a proper charge to prefer in order to effect such removal?"

OPINION

The pertinent legislation herein was enacted in 1953 (see Stats. 1953, Chapters 1823 and 1826), and, basically, requires either registration or licensing within a year from the effective date thereof. Said latter date being September 9, 1953, such requirements made it necessary that anyone practicing physiotherapy in this state on and after September 9, 1954, must be registered with or licensed by the State Board of Medical Examiners. (Sec. 2665, Bus. & Prof. Code)

You have informed me that the concerned physiotherapist, employed in the San Francisco Hospital, has not taken any of the steps necessary to so become registered or licensed. Engaging in the practice of physiotherapy without such registration or license is declared to be a misdemeanor, punishable by fine or imprisonment, or both. (See Sec. 2690, Bus. & Prof. Code.)

In my Opinion No. 751, dated November 20, 1953, I advised that the legislation now under consideration was controlling over our own local ordinance insofar as was concerned coverage thereby of the practice of physiotherapy. In said opinion it was stated that such regulation as was effected by the state legislation was over a matter of "statewide concern", and not merely a "municipal affair." Hence, that legislation superseded any purely local law involving the same or similar subjects.

While it is true that the local civil service system, with its procedures for acquiring, maintaining in employment and discharging city employees, is generally held to be solely a municipal affair, with respect to which the city operates free of the impact of state law (City of Pasadena v. Charleville, 215 Cal. 384; Adams v. Wolff, 84 Cal. App. (2) 435), such rule cannot obtain in a situation such as the present; such being so for the reason, as pointed out in my Opinion 751, noted above, that the matters of qualification for and practice of physiotherapy are of "statewide concern", and the state, possessing the power to do such, has established requirements which must be met by physiotherapists in municipal employment as well as by physiotherapists in private practice. The fact of incidental interference with the city's civil service system does not lessen the force and effect of the state legislation, as discussed above. (See Dairy Belle Farms v. Brock, 97 Cal. App. (2) 146; Polk v. City of Los Angeles, 26 Cal. (2) 519.)

By proscribing the practice of physiotherapy without registration or license, and providing that violation of such law shall be a criminal offense, the legislature has established a statewide public policy (see Berka v. Woodward, 125 Cal. 119; Smith v. Bach, 183 Cal. 259) which, for the reasons discussed above, supersedes our local civil service laws and regulations insofar as employee qualifications are concerned.

In view of such public policy, and the failure of the concerned employee to conform thereto by procuring registration or a license, it would seem the clear duty of the city to discharge her from her position of physiotherapist. (see Pratt v. Los Angeles County Civ. Serv. Comm., 108 Cal. App. (2) 114, at 121-122) Without considering the legal niceties incident to your question of whether the city, or the employee's superiors, are "violating" the Business

and Professions Code by continuing her in city employ, it seems certain that in furtherance of the expressed public policy of the state, the unqualified (in law) employee may not be continued in her present position.

Regarding your question about procedure for dismissal, the employee involved should be given a noticed hearing in which all of the procedures set forth in Charter Section 154 are observed. While there is authority for the view that a lack or loss of qualifications required by applicable law are within the meaning of a charge of "incompetence" (see Schroeder v. Superior Court, 70 Cal. 343; U.S. v. Nez Perce County, 267 Fed. 495; Horosko v. School District of Mount Pleasant, 6 Atl. 866 (Pa.); 31 C. J. 404; see also Webster's New International Dictionary, Second Edition (1945)), it is my view that the proceeding to dismiss said employee need not be based upon any of the grounds for dismissal specified in the second paragraph of Charter Section 154. While, as advised above, the procedural steps prescribed in that charter section should be followed -- to the end of making a factual determination of lack of registration or licensing -- the reason for such dismissal is found in the state law which supersedes any charter -- defined grounds. Hence, the employee need only be charged with a failure to have qualified herself as a physiotherapist under the governing mandate of the state law. Such proceeding should be instituted forthwith.

In view of the advice given above, it is considered unnecessary to herein treat upon the laboriously involved issue of tort liability suggested by your second question.

Accordingly, you are advised as above set forth with respect to your first and third questions.

Respectfully submitted,

DION R. HOLM
City Attorney

TO: DR. ELLIS D. SOX
Director of Public Health
101 Grove Street
San Francisco 2

WFB/BJW

OPINION NO. 974
July 19, 1955

SUBJECT: CITY MAY REQUIRE PROPERTY OWNER TO REPORT UPON CONDITION OF SIDEWALK ABUTTING HIS PROPERTY AND PARTICULARLY UPON DEFECTIVE CONDITION OF SIDEWALK

Dear Sir:

This is in response to your request for an opinion as follows:

REQUEST

> "Supervisor Ferdon has directed me to request your opinion, responsive to the following query:
>
> "'Can the city require property owners, upon forms attached to their respective tax bills or by some other means, to report, say twice a year, upon the condition of the sidewalk adjacent to the property of each such owner, or to report immediately a defective condition is noticed?'"

OPINION

Under state statute, the Charter (Sec. 107) and city ordinances a duty has been created upon the property owner to keep the sidewalk abutting his property in repair (which is the duty owed to the city alone and not to a traveler on the sidewalk) or to reimburse the city for the cost to the city of making the repairs to the sidewalk. See Schaefer v. Lenahan, 63 Cal. App. 2d, 324.

As the property owner has by legislation been required to keep the sidewalk abutting his property in repair, I can see no legal objection to imposing upon the property owner the requirement of reporting to the city periodically upon the condition of the sidewalk abutting his property and of notifying the city immediately of any defect which he may notice upon the said sidewalk.

You are advised accordingly.

Respectfully submitted,

DION R. HOLM
City Attorney

LSM/BJW

To: John R. McGrath, Clerk
Board of Supervisors
235 City Hall

OPINION NO. 975

July 27, 1955

SUBJECT: LIABILITY OF SPONSOR FOR EXPENSE OF ALIEN CARED FOR AT COUNTY HOSPITAL.

Gentlemen:

You have propounded a request for an opinion, raising the following questions: (1) What is the liability of a sponsor of an alien who is treated at San Francisco Hospital but is not eligible as a medical indigent because of lack of sufficient residence in the State of California? (2) Is the sponsor liable for the hospital care of the alien, even though the hospital care is necessitated by physical injury arising from an accident occurring after the alien takes up residence in the city and county? (3) What is the period of time during which a sponsor is liable for county hospital care rendered an alien?

OPINION

Your request concerns the liability of sponsors for aliens as set forth in 8 U.S.C.A. §1183:

> "Any alien excludable because he is likely to become a public charge or because of physical disability other than tuberculosis in any form, leprosy, or a dangerous contagious disease may, if otherwise admissible, be admitted in the discretion of the Attorney General upon the giving of a suitable and proper bond or undertaking approved by the Attorney General, in such amount and containing such conditions as he may prescribe, to the United States and to all States, Territories, counties, towns, municipalities, and districts thereof holding the United States and all States, Territories, counties, towns, municipalities, and districts thereof harmless against such alien becoming a public charge. In lieu of such bond such alien may deposit in cash with the Attorney General such amount as the Attorney General may require, which amount shall be deposited by him in the United States Postal Savings System, a receipt therefor to be given the person furnishing such sums showing the fact and object of its receipt and such other information as the Attorney General may deem advisable. All accruing interest on such deposit during the time it shall be held in the United States Postal Savings System shall be paid to the person furnishing such sum. In the event such alien becomes a public charge, the Attorney General shall dispose of such deposit in the same manner as if it had been collected under a bond as provided in this section. In the event of the permanent departure from the United States, the naturalization, or the death of such alien, such sum shall be returned to the person by whom furnished, or to his legal representatives. The admission of such alien shall be a

> consideration for the giving of such bond, undertaking, or cash deposit. Suit may be brought thereon in the name and by the proper law officers of the United States for the use of the United States, or of any State, Territory, district, county, town, or municipality in which such alien becomes a public charge."

Under the above section, as you will note, there is a system prescribed whereby a sponsor may post a bond available for the reimbursement of a county or municipality incurring expense because such alien becomes a public charge. This statute is further implemented by a regulation of the Department of Justice, found in 8 C.F.R. §3.1 (effective June 19, 1953; published 18 F.R. 3526, June 19, 1953; amended effective October 31, 1953, published 18 F.R. 6236, September 30, 1953). This regulation, too long to be quoted here, provides for an administrative proceeding brought by a District Director of Immigration or other officer in charge to determine whether the conditions of a bond have been breached and whether a governmental agency that has incurred expense should be indemnified. The official in charge of such proceeding has discretion, on the basis of the material furnished him, of determining whether a bond has been violated and whether an action should be instituted on the bond. In the light of this information, I shall answer the questions which you have put.

Question 1: It is my conclusion that under the statute and regulation discussed above there may be liability of a sponsor on the bond given for such alien, but such liability only exists as determined by the District Director of Immigration in the exercise of his discretion and upon the facts presented to him. Such liability also depends upon the terms of the bond. This bond is filed at the port of entry or at the office of the Commissioner in Washington. The District Director would, of course, review its terms in determining whether there was liability.

Question 2: The answer to this question is that it appears that such liability could exist, subject of course to the decision of the District Director of Immigration on this matter. In the only reported authority on this point, United States v. Lipkis, 56 Fed. 427, it was held to be a circumstance contemplated by the bond that the alien might become insane after her arrival, and it was held that suit lay on the bond to reimburse a city for hospital care necessitated by said illness. It was held that such a contingency was within the terms of the bond.

Question 3: You have inquired whether there is a five-year limitation after which liability of a sponsor on the bond ceases. After investigation I can find no such limitation. Rather, the statute and the regulation above quoted seemingly contemplate that liability continues until the alien is naturalized, departs from the United States, dies, or until a new bond is substituted. See

8 C.F.R. 3.1 (c) (2). The local office of the Bureau of Immigration and Naturalization has informed me that the practice of that agency allows the forfeiting of a bond for breach of condition at any time before the occurrence of one of the events listed above.

You are advised accordingly.

Respectfully submitted,

DION R. HOLM, City Attorney.

TO: DEPARTMENT OF PUBLIC HEALTH
Social Service Division
San Francisco Hospital
Potrero Avenue and 22nd St.
San Francisco 10

Attention: C. K. Howan,
Director of Admissions.

RMD/RS

Opinion No. 976
August 1, 1955

SUBJECT: SOCIAL SECURITY COVERAGE FOR MEMBERS OF THE SAN FRANCISCO CITY AND COUNTY RETIREMENT SYSTEM, PROCEDURE FOR; SUPPLEMENTATION OR INTEGRATION; NECESSITY OF CHARTER AMENDMENT.

Gentlemen:

This office is in receipt of your request for an opinion at the direction of Supervisor McCarty wherein you refer to me for response certain questions which arise out of two legislative developments: (a) passage by the United States Congress of certain amendments to the Social Security Act which permit federal coverage of employees now under a local retirement plan; and (b) passage by the State Legislature of enabling legislation relating to agreements for social security coverage of employees of public agencies. The State legislation to which you referred in your request was Chapter 10, Stats. 1955 (A.B. 408), which added Part 4 to Division 5, Title 2 of the Government Code, and became effective January 28, 1955. Since the receipt of your request said Chapter 10, Stats. 1955, has been repealed by the enactment of Chapter 1441, Stats. 1955 (AB 2368), which added a new Part 4 to Division 5, Title 2 of the Government Code, which amendment became effective June 29, 1955.

Inasmuch as the same questions arise in relation to Chap. 1441, Stats. 1955, (AB 2368) (the new legislation adopted which repealed the said Chapter 10, Stats. 1955, (AB 408)), the questions proposed in your request will be answered in relation to the new legislation.

The questions asked by you are the following:

(1) Does the phrase "that the protection afforded employees in positions covered by a retirement system . . . will not be impaired" as used in Section 22000 of the Government Code mean that the full benefits of the present local retirement system must be maintained and that federal benefits shall be supplementary to the full benefits now provided by the local retirement system?

(2) If a referendum is held as provided in said statute and the majority of eligible employees vote in favor of social security coverage, is any amendment to the charter necessary?

(3) Can the Board of Supervisors by ordinance request a referendum as provided by §22300 of the Government Code?

(4) Can the Board of Supervisors by ordinance request the State to execute on behalf of the State the agreement with the federal agency for the coverage of employees as provided in §22201?

(5) If the answers to the last two questions are in the affirmative does such an ordinance require a majority vote or a three-fourths vote by the Board of Supervisors?

OPINION

Answer to Question 1:

In your first question you desire to know whether the language of §22000 of the Government Code "that the protection afforded employees in positions covered by a retirement system . . . will not be impaired" means that the full benefits of the present local retirement system must be maintained and that federal benefits shall be supplementary to the full benefits now provided by the local retirement system.

That language of said Government Code §22000 is taken verbatim from the 1954 amendments to the Social Security Act which amendments extended coverage to employees of state and local governments presently under retirement systems. Section 218(d) of the Social Security Amendments of 1954 provides as follows:

> "(2) It is hereby declared to be the policy of the Congress in enacting the succeeding paragraphs of this subsection that the protection afforded employees in positions covered by a retirement system on the date an agreement under this section is made applicable to service performed in such positions, or receiving periodic benefits under such retirement system at such time, will not be impaired as a result of making the agreement so applicable or as a result of legislative enactment in anticipation thereof." (42 U.S.C. Sec. 418 (d) (2))

There is no explanation in the federal legislation as to what would constitute an impairment of the protection afforded employees by their present Retirement System, nor is there any explanation of what would constitute impairment of the protection afforded employees by their present Retirement System in the State legislation.

An examination of §22304 of the Government Code, which is part of Chapter 1441, Stats. 1955 (AB 2368), is of assistance in answering your question. Said section in dealing with the referendum to be conducted among the members of a local retirement system provides that the notice of referendum required to be given to employees

should contain or be accompanied by a statement informing the employees of the rights and benefits which would accrue to them and their dependents and their survivors and the liability to which they would be subject if their services were included under the agreement, and then states:

> "Such statement shall include a general explanation of the modification, if any, of the existing retirement plan that may result therefrom. It is not intended that any modification of any existing retirement plan must result, nor that a plan of maintaining full benefits of the local system together with full benefits of the federal system shall be precluded."

It is obvious that reading §22304 of the Government Code with §22000 of the Government Code, both of which sections are part of the same statute and therefore must be construed together, that it was contemplated that there could be modifications of the existing retirement plan in connection with the granting of social security benefits to governmental employees who are presently under local retirement systems.

Said §22304 of the Government Code, however, clearly indicates that there need not be any modification of any existing retirement plan and that a plan of maintaining full benefits of the local system together with full benefits of the federal system would be proper.

Therefore, in specific response to your first question please be advised that under Chap. 1441, Stats. 1955 (AB 2368), while full benefits of the present local retirement system may be maintained and federal benefits be supplementary to the full benefits now provided by the local retirement system, the said statute also contemplates that there may be a modification of the existing retirement system in connection with the grant of social security benefits under the federal system.

I do not feel it necessary at the present time to consider the question of what modification there could be in a local retirement system which would not constitute an impairment of the protection afforded employees covered by the Retirement System, nor the question of the legal consequences should the modification of the local retirement system in fact constitute an impairment of the protection afforded by the said local retirement system.

Answer to Question 2:

You next raise the question as to whether a charter amendment will be necessary in order to grant social security coverage to employees should there be a referendum and the majority of the eligible employees vote in favor of said coverage.

In my answer to question 1, I indicated that there were two possibilities of coverage contemplated by the statute: (a) complete benefits under the local retirement system with full supplementation by social security benefits; and (b) an integration which would mean a modification of the local retirement system supplemented by benefits under social security.

An integrated system as set forth above would contemplate some change and modification of the present retirement provisions of the City and County of San Francisco. It is therefore apparent that under an integrated system whereby there would be a modification of the present retirement system there would necessarily have to be a charter amendment to make the requisite changes in the present charter provisions establishing the retirement system to effectuate the necessary changes in the local retirement system to bring about the modification thereof.

The question then remains as to whether a charter amendment would be necessary in the situation where there would be full supplementation of local retirement benefits by social security coverage so that there would be no change in the local retirement system.

It should be noted that the extension of benefits of the social security provisions of the law to employees of state and local governments under retirement system has been declared to be the policy of the federal and state governments, both of which have taken the necessary legislative action to accomplish this end.

As the legislative policy has been determined by the State Legislature and no change is to be made in the local retirement system by the program of full supplementation, no charter amendment would be necessary. No further legislative action is necessary for the granting of such benefits to members of the local retirement system other than that of following the procedure set forth in the state statute.

Answer to Question 3:

Your next question is whether the Board of Supervisors may by ordinance request a referendum as provided in Section 22300 of the Government Code.

Section 22300 of the Government Code provides as follows:

> "Unless otherwise provided in this article the board shall authorize a referendum among the eligible retirement system employees of any retirement system coverage group upon the request of the legislative or governing body of any public agency having employees in such retirement system covered group."

The Board referred to in said Section 22300 is the Board of Administration of the State Employees' Retirement System (Government Code Section 22004).

The notice of referendum to be given to the employees in connection with the referendum is required to contain or to be accompanied by a statement informing the employees of the rights and benefits which will accrue to them and their dependents and survivors, and the liabilities to which they will be subject if their services are included under the agreement which would extend to them the benefits of the social security and also a statement setting forth a general explanation of the modification, if any, of the existing retirement plan which will result from the said agreement. (Government Code Section 22304.)

It is obvious therefore that before the legislative or governing body of the public agency may request the Board of Administration of the State Employees Retirement System to conduct the referendum as covered by Section 22300 of the Government Code, the legislative body must first have determined the program to be adopted, that is, (1) whether it should be one of full supplementation, or (2) whether it should be one of integration and, if so, precisely what changes and modification would be made in the existing retirement system.

Specifically in response to the question asked, you are advised that the Board of Supervisors as the legislative or governing body of the employees of the City and County of San Francisco may by ordinance request the Board of Administration of the State Employees' Retirement System to conduct the referendum contemplated by Chapter 1441, Stats. 1955.

Answer to Question 4:

Your next question is whether the Board of Supervisors by ordinance can request the state to execute the agreement with the federal agencies for coverage of employees as provided in Government Code Section 22201.

Section 22201 of the Government Code provides as follows:

> "The board shall, upon application by any public agency except the State, in accordance with the provisions of this part execute on behalf of the State an agreement with the federal agency for the coverage of employees of such public agency under the federal insurance system in conformity with the provisions of Section 218 of the Social Security Act and applicable federal regulations."

The Board referred to in said section is the Board of Administration of the State Employees' Retirement System. (Government Code Section 22004.)

The application insofar as the employees of the City and County of San Francisco are concerned to the Board of Administration of the State Employees Retirement System to execute on behalf of the state an agreement with the federal agency for the coverage of said employees under the federal insurance system, may be made by the Board of Supervisors by ordinance.

Answer to Question 5:

Your next question is whether, if the Board of Supervisors may by ordinance request the referendum referred to above and may by ordinance request the state to execute on behalf of the state the agreement with the federal agency for the coverage of employees, such ordinances require a majority vote or three-fourths of the members of the Board of Supervisors. Section 158 of the Charter provides that the Board of Supervisors is empowered to enact by a vote of three-fourths of its members any and all ordinances necessary to carry into effect the provisions of Section 158 to 172 of the Charter governing benefits under the Retirement System of the City and County of San Francisco.

Your question here raises the issue as to whether either of the ordinances referred to above would be an ordinance pursuant to said provision of Section 158 which would require three-fourths vote of the members of the Board of Supervisors.

You are advised that the ordinances contemplated to be adopted as set forth in response to questions 3 and 4 above are not ordinances enacted to carry into effect the provisions of Section 158 to 172 inclusive of the Charter but are ordinances enacted to carry into effect a program established by the state and therefore the requirement of Section 158 that the ordinance be adopted by a vote of three-fourths of the members of the Board of Supervisors is not applicable.

You are, therefore, advised that the ordinances referred to above, to wit, the ordinance authorizing the state agency to conduct a referendum, and the ordinance authorizing the state to enter into an agreement with the federal agency for the extension of coverage to the city employees, require only a majority of the members of the Board of Supervisors for adoption.

Respectfully submitted,

DION R. HOLM
City Attorney

LSM/NSW

TO: Board of Supervisors
235 City Hall
San Francisco 2
Attention: John R. McGrath, Clerk.

OPINION NO. 977

August 8, 1955

SUBJECT: HEALTH SERVICE SYSTEM, LEGALITY OF PAYING PLAN I MEMBER AMOUNT OF HOSPITAL BILL WHICH PRIVATE INSURANCE COMPANY HAS PAID.

Gentlemen:

I am in receipt of your request for opinion as follows:

REQUEST

"Enclosed please find copy of a communication I have directed to the Health Service Board in connection with the approval of a hospital bill for Mrs. Yolanda Mazzoni.

"It will be appreciated by the writer if, in accordance with the instructions raised in the attached letter, you will submit your opinion on the legality of the payment of the claim of Mrs. Mazzoni."

The letter, copy of which you attach, reads:

"Mr. Theodore T. Dolan, President
Health Service Board
61 Grove Street - Room 305
San Francisco 2, California

"Dear Mr. Dolan:

"It has been brought to my attention that at the meeting of the Health Service Board on Thursday, June 23 a motion was made and carried, by a 4-to-3 vote, to approve for payment the hospital bill of Member W-10628, Mrs. Yolanda Mazzoni. Such action, with only seven members present, was in utter disregard of the previous actions taken by the Health Service Board, and, in my opinion, was irregular for the following reasons:

"1. Pursuant to provisions 11 and 12, Part 3 of the Rules and Regulations of the Health Service Board, it is necessary that an itemized bill be submitted for approval. In this instance such member not only did not submit an itemized bill but failed to submit any bill to the Health Service System.

"2. Pursuant to Legal Opinion 889 the Health Service Board cannot legally reimburse a member for that portion of a hospital bill which has been paid by another organization. In the present case Liberty Mutual Insurance Company paid the bill, thus relieving the Health Service System of any obligation in the matter.

"3. Adoption of the motion to approve by a temporary majority is diametrically opposed to the action of the full membership of the Board.

"4. There was no motion made to reconsider the previous action nor was there an action to rescind the Board action by which it had refused payment of the bill.

"Pursuant to provisions 36, 37 and 38 of Robert's Rules of Order either one of two motions should have been made and failure to so do would invalidate the action taken by the Board.

"Inasmuch as this matter will be on the rolls to be approved by the Board at its meeting of July 28, at which time I will be out of town on vacation, I am requesting that based on the foregoing reasons the Board refuse to approve the roll purporting to authorize the payment of $133.50 for hospital services rendered Mrs. Yolanda Mazzoni.

"I have forwarded a copy of this communication to the City Attorney for his opinion on the matter and also to the Controller so that he may be aware of the circumstances involved.

Yours very truly,

Philip P. Engler"

OPINION

In Opinion No. 889, dated October 18, 1954, it was held that "if a hospital bill for services rendered a member is fully paid by another organization (C.P.S., Blue Cross, etc.), the Health

Service System is under no obligation to pay the member the amount of such bill." In Opinion No. 924, dated January 20, 1955, it was said with reference to a related matter: "The result is the same whether the other organization is a so-called service organization (C.P.S., Blue Cross, etc.) or an insurance company."

As pointed out in Opinion No. 889, Plan I is a plan for rendering medical care to members. Subject to monetary and other limits, it entitles members to receive hospital care at the expense of the System. Within these limits the System assumes the liability to the hospital and pays the hospital directly. All hospitals in San Francisco have contracts with the System. If the hospital has been paid by another service organization or by an insurance company, the debt to the hospital has been cancelled and there is no hospital bill for the System to pay. Where it is necessary for a member to pay his hospital bill (e.g., where he is hospitalized outside of San Francisco in a hospital which does not have a contract with the System), Plan I provides that, within the stated limits, he shall be indemnified, that is, reimbursed, for the sums he expends. (§13 of Part III of Plan I.) Other than this, there is no provision in Plan I for paying a member the amount of his hospital bill.

The copy of communication you attach states that Liberty Mutual Insurance Company paid the bill in question. The case presented is therefore governed by Opinion No. 889.

Discussion of other points mentioned in this communication is unnecessary except to note the statement that the member concerned did not submit a hospital bill to the System. Sec. 13 of Part III of Plan I provides that where it is necessary for a member to pay his hospital bill, he shall be indemnified "in an amount not to exceed the rate or rates set forth in the benefit schedule and fee schedules adopted by the Health Service Board." It is difficult to see how the Board could accurately determine that the amount of indemnity approved did not exceed these rates without checking the hospital bill against them. In my opinion the Board should require submission of a bill containing sufficient information to make such check before approving either its payment or a claim for reimbursement based upon it.

In accordance with Opinion No. 889, and based upon the information you have submitted, it is my opinion that the System

cannot legally make payment of the claim referred to under the provisions of Plan I.

Respectfully submitted,

DION R. HOLM
City Attorney

TO: HEALTH SERVICE SYSTEM
61 Grove Street
San Francisco 2
Attention: Mr. Philip P. Engler

GEB/BW

OPINION NO. 978

August 9, 1955

SUBJECT: RIGHT OF UNMARRIED MINOR MOTHER TO AUTHORIZE AUTOPSY ON DECEASED CHILD

Dear Sir:

This office has received the following request for opinion:

REQUEST

"May we have a legal opinion regarding the right of an unmarried minor mother to authorize in writing an autopsy on her deceased child.

"The following two provisions apply to the legal right of a minor person to sign for the adoption of the child and the right to give consent for her own medical and hospital care:

"1. Under the 1953 Welfare and Institutions Code of California, Section 226, 'A parent who is a minor shall have the right to sign a consent for the adoption of his or her child and such consent shall not be subject to revocation by reason of such minority.'

"2. The recent section 34.5 which has been added to the Civil Code reads, 'Notwithstanding any other provision of the law, an unmarried pregnant minor may give consent to the furnishing of hospital, medical and surgical care related to her pregnancy, and such consent shall not be subject to disaffirmance because of minority. The consent of the parent or parents of an unmarried, pregnant minor shall not be necessary in order to authorize hospital, medical and surgical care related to her pregnancy.'

"Can these two provisions be interpreted to cover the minor mother's consent and authorization for autopsy on the child who is born alive but dies in the hospital?"

OPINION

It should be noted that the source of the first of these sections should be designated as the Civil Code rather than the Welfare and Institutions Code.

I am of the opinion that the first of the sections quoted has no application to the authorization of an autopsy by an unmarried minor mother upon her deceased child. "Adoption" is defined as "the act by which relations of paternity and affiliation are created and

recognized as legally existing between persons not so related by nature or by law." 2 Cal. Jur. 2d 417. The law regulating consensual arrangements for adoption is not relevant.

The second section quoted is broad enough to allow an unmarried minor mother to give an irrevocable consent for an autopsy upon the death of her newborn infant, if such autopsy is a "furnishing of hospital, medical and surgical care related to her pregnancy." However, if the autopsy on the infant did not relate to medical care of the mother in connection with her pregnancy, then the quoted section would not serve as authorization for such autopsy.

According to the law governing control of dead bodies, a minor mother would have the prior right to control disposition of the remains of her deceased child. Health and Safety Code, Section 7100; see my opinion No. 935, March 22, 1955. It is well established that a person controlling the disposition of human remains is authorized to consent to the performance of an autopsy. 15 Cal. Jur. 2d 53; 15 Am. Jur. 847-848; Winkler v. Hawkes, 126 Ia. 474, 102 N.W. 418; McDonald v. Goodman, (Court of Appeals of Ky.) 239 S.W. 2d 97; see Health and Safety Code, Sections 7113 and 7114 (allowing funeral director to permit autopsy on such written authorization.).

The question to be determined in each case is the effectiveness of the consent of the particular minor to the autopsy which is desired. Consent is necessary. However, the law is clear that there is no property right in a body that is violated by an unauthorized autopsy.

Since it is only a personal right of the mother that is concerned, and not a property right, there is authority that would probably bar her from recovering once she had consented to such autopsy. It has been held, in cases of adults, that consent to conducting of an autopsy bars recovery for the consequent mental distress. Winkler v. Hawkes, supra, McDonald v. Goodman, supra. In California there is no case in point on this problem, but the general rule is recognized that consent to the commission of what would otherwise be a tortious act constitutes a defense in any subsequent legal action. Churchill v. Baumann, 95 Cal. 541; see also Hudson v. Craft, 33 Cal. 2d 654 (recognizing the general rule with exceptions where indicated by express legislation to contrary).

This problem of tort liability is complicated by the fact that minors are involved. The Restatement of Torts, Section 59, Comment a, deals with this problem as follows:

> "a. If the child or person of deficient mental condition, though under guardianship, is capable of appreciating the nature, extent and consequences of the invasion, his assent

> prevents the invasion from creating liability, though the assent of the parent, guardian or other person is not obtained or is expressly refused."

Cases in other jurisdictions have applied this rule. Baker v. Welsh, 144 Mich. 632, 108 N.W. 94 (17-year-old-boy--surgical operation); Gulf & S.I.R.Co. v. Sullivan, 155 Miss. 1, 119 So. 501 (same); Bishop v. Shurly, 237 Mich. 76, 211 N.W. 75 (surgical operation on 19-year-old youth). Other cases have not applied the above rule as liberally but have required that the minor have a complete understanding of the particular operation involved and be close to maturity, in order that he understand the full implications of his consent. Bonner v. Moran, 126 Fed. 2d 121; Zoski v. Gaines, 271 Mich. 1, 260 N.W. 99.

In view of the state of the law in this matter, it is my opinion that you should perform an autopsy of the type suggested on the consent of the mother only under the following circumstances:

(1) Where the nature and extent of the autopsy have been fully explained to the mother, and

(2) Where in your best judgment she fully and completely understands and appreciates the nature, extent and consequences of performing said autopsy and its effect upon her right to control the disposition of her child's remains.

Only if both of these two conditions are fully satisfied should such autopsy be performed. This determination would have to be made in regard to both the age and mental condition of the particular mother. For evidentiary purposes, such consent should be obtained in writing. It is also of the utmost importance in conducting the autopsy that the authorization given be strictly observed and that its terms should not be exceeded.

You are advised accordingly.

Respectfully submitted,

DION R. HOLM
City Attorney

TO: Ellis D. Sox, M.D.
Director of Public Health
101 Grove Street
San Francisco 2

RMD/AOS

OPINION NO. 979

August 10, 1955

SUBJECT: LEGALITY OF LAY-OFF OF EMPLOYEES DUE TO REDUCTIONS IN FORCE ON BASIS OF DEPARTMENTAL OR SERVICE-WIDE SENIORITY.

Dear Sir:

Reference is made to your recent request for an opinion as follows:

REQUEST

> "Pursuant to the provisions of section 141, the Civil Service Commission has adopted a rule governing order of lay off in reductions in force. Under this rule (No. 26) it is provided that reduction in force in any class shall be treated separately under each appointing officer. In case of reduction in force, the last person appointed in the class to that appointing officer is laid off first. Thus a reduction in force under one appointing officer has no effect on appointees in the same class under another appointing officer. Therefore the rule of the Commission provides that lay offs shall be made on the basis of department seniority.
>
> "Certain employees have requested the Commission to amend its rule to provide for layoff on the basis of service-wide seniority. In other words, in case of a reduction in force in a department, the last person appointed to that class in the entire city service would be laid off. This vacancy would then be filled by transfer from the department in which the reduction in force occurs of the appointee with longer seniority.
>
> "In discussing this proposal the writer has pointed out various objections and administrative problems that would be created. These are outlined in the attached memorandum and we invite your particular attention to item 6 which raises a question as to power of the Commission to adopt a rule which would compel an appointing officer to terminate the services of an employee because of a reduction in force under an entirely different appointing officer.

"The Commission is not committed to change from departmental to service-wide seniority as a basis for determining lay offs. There are administrative problems involved as well as policy matters and these are apart from the question of legal authority. However the employees have requested that your advice be sought as to whether such a change could be made by the Civil Service Commission under section 141, 148, and 154 of the Charter."

Item 6, referred to above, reads as follows:

"6. Section 148 of the charter provides that whenever a civil service position is to be filled, the appointing officer shall make a requisition on the Civil Service Commission and the Commission shall certify the name of the person standing highest on the list of eligibles for appointment to the position. Thus, the eligible becomes an appointee in a particular classification in a particular department by appointment of the head of that department. He acquires a vested right and status in that position but in no other. He is subject to the administrative control of his department head and to no other. He may only be removed from his position by his appointing officer and by no other, and as follows:

"a) While serving a probationary appointment (section 148; b) after completing his probation by action initiated by the head of the department under the dismissal proceedings (section 154); and c) in a reduction of force.

"Section 154 dealing with removal for cause provides that nothing therein shall restrict or limit the rule of the Civil Service Commission governing lay-offs due to reduction in force. Section 141 provides that the Civil Service Commission shall adopt rules to carry out the civil service provisions of the charter and 'except as otherwise provided in the charter such rules shall govern * * * lay-offs or reductions in force due to lack of work or funds, retrenchment or completion of work * * * and

> such other matters as are not in conflict with the charter.' I doubt that this language gives the Commission power to adopt a rule setting up a procedure which would abridge or impair the administrative control of the department head by compelling him to terminate the appointment of one of his employees because of a reduction in force occurring in another department."

OPINION

Section 141 of the City charter empowers the Civil Service Commission to adopt its own rules governing lay-offs or reductions in force due to the above mentioned causes provided they are not inconsistent with other charter provisions. The law generally also requires that such rules be reasonable and not arbitrarily discriminatory or fraudulent in their application. (Villain v. Civil Service Commission, 18 C. 2d 861, 117 P. 2d 880; Dierssen v. Civil Service Commission, 43 C.A. 2d 53, 110 P. 2d 513; Terry v. Civil Service Commission of San Francisco, 108 C.A. 2d 861, 240 P. 2d 691.)

Your statement of facts shows that the Commission has embodied its power in such respect for quite some time under Rule 26, providing that lay-off determinations in any given classification of civil service employment be made according to seniority within the affected department. You also state various administrative and policy reasons why the Commission has resisted thus far requests from certain employees that said departmental rule be abandoned in favor of a broader service-wide seniority rule. Those reasons seem to me to be sufficient for the Commission to continue operating under Rule 26, if it so desires, inasmuch as its adherence to seniority determined on a departmental basis does not appear to be an unreasonable handling of the problem when considered as a whole. (Shannon v. McKinley, 62 C.A. 2d 169, 144 P. 2d 433; State ex rel Salverson v. City of Milwaukee, et al, 229 Wisc. 351, 24 N.W. 2d 640.)

On the other hand, and on the basis of the same authority, if the Commission should see fit to amend Rule 26 by the method prescribed in Section 141 of the City charter, so as to place lay-offs due to reduction in force on a service-wide basis of seniority, I believe the charter and laws generally permit such a change in the rule as distinguished from requiring it. While undoubtedly a large number of city employees have acquired what you term "vested right and status" to their positions under the long-standing departmental

rule of seniority, nevertheless it is not such a closed-door right or status that it may not be made to yield to the Commission's general power under said Section 141 to change its rules in any reasonable way it may deem for the good of the service. The only exceptions would be cases actually pending before the Commission at the time when such a change in the rules takes place.

It is true, as you have observed, that a combined reading of Sections 141, 148 and 154 of the charter shows the various departmental heads of the city given certain administrative rights along with the Commission, and also shows the methods by which civil service employees attain either temporary or permanent status, but such rights are not in derogation of the more general and overall right established in the Commission to adopt rules and change them in good faith in such manner as it may deem appropriate.

You are therefore advised that it would be within the discretion of the Commission to change its seniority rules governing lay-offs or reductions in force from the present departmental type to the service-wide type, but it is not a requirement of the law. However, it is highly probable that a change over to seniority rule on a city-wide basis would precipitate considerable litigation and your observation that such a course should be undertaken only for compelling reasons seems to be appropriate.

Very truly yours,

DION R. HOLM
City Attorney

TO: WILLIAM L. HENDERSON
Personnel Director and Secretary
Civil Service Commission
151 City Hall
San Francisco 2

RJR/BJW

Opinion No. 980
August 11, 1955

SUBJECT: PURCHASE AND USE TAX; ELECTRIC SIGNS FABRICATED IN OAKLAND AND INSTALLED IN SAN FRANCISCO, SUBJECT TO TAX, NATURE OF PROPERTY.

Dear Sir:

This office is in receipt of your request for opinion as follows:

REQUEST

> "It would be appreciated if you would give the Review Board an opinion as to whether the electrical signs, fabricated by the Electrical Products Corporation in Oakland and installed on buildings or other structures in San Francisco, are subject to the local purchase and use tax and as to whether, when such is installed either through sales or rental, the signs become a part of the real property where they are installed or continue to be tangible personal property."

OPINION

1. The electric signs that are fabricated in Oakland and installed in San Francisco by the Electrical Products Corporation under a lease agreement whereby the Electrical Products Corporation retains title to the signs and under which agreement the signs are specifically made personal property are subject to tax under the Purchase and Use Tax Ordinance of the City and County of San Francisco.

2. In the course of the installation of electric signs on buildings the sign must be attached to the building and the electric wiring and conduits must be connected to the electric outlets. The question arises whether for purposes of taxation these signs become part of the real property or are "fixtures". Ruling No. 11 of the Administrative Code, 1921, of the Board of Equalization Sale and Use Tax Rules and Regulations defines the word "fixtures" as "things which are accessory to a building and which do not lose their identity as accessories when placed or installed. Fixtures include such things as . . . lighting fixtures and signs." Under the above definition these signs are fixtures and taxable as such.

In some instances the signs belong to someone other than the owner of the realty and the Electrical Products Corporation installs the electric neon tubing on the signs connecting the wires and conduits to the building. The neon tubing is a part of the sign and would be considered an integral part of it. The sign under the rule set forth above being a fixture would not become a part of the realty.

3. Signs have been installed under the rental agreement used by the Electrical Products Corporation and at a later date a sign may be sold to the building owner or to someone else. The sale is the sale of a "fixture" and is taxable as such.

4. Section 18.1 of the Purchase and Use Tax Ordinance of the City and County of San Francisco will be applicable only when the terms of the section have been met.

Respectfully submitted,

DION R. HOLM
City Attorney

AOS/TJB

TO: Mr. T. A. Brooks
Chief Administrative Officer
289 City Hall
San Francisco 2, California

OPINION NO. 981

August 17, 1955

SUBJECT: CITY PLANNING, STIPULATION LIMITING BLOCK COVERAGE BY IMPROVEMENTS, APPLICATION TO INDIVIDUAL LOTS.

Dear Sir:

REQUEST

You request that I advise you as to the correct interpretation of a stipulation affecting certain property upon which an application to build has been filed.

> "The stipulation provides that the building coverage in any one block of the area covered by the reclassification shall not exceed 65 per cent. The applicant's building would cover 75% of the lot involved, and his contention is that since existing buildings on the rest of the block have lower coverage than 65 percent, he should be allowed to build as requested.
>
> "The question is whether the stipulation should be interpreted as restricting each separate lot to a maximum of 65 per cent coverage or whether all applications for individual buildings which do not bring the total coverage for the block over 65% should be approved as satisfying the requirement."

OPINION

The stipulation reads as follows:

> ". . . the building coverage of any one block shall not exceed 65 per cent of said block."

The information provided me by your office indicates that the stipulation was entered into with the M. Corporation, which intended to develop these particular blocks on Laurel Heights, and that the present applicant is a successor in interest of that corporation. The stipulation binds "the applicants and their successors in interest." The stipulations were embodied in Resolution No. 2953 adopted by the City Planning Commission in 1945. I have also been informed that there still remain some unimproved lots in this particular block.

Your question narrows down to whether this particular building will violate the stipulation.

Although resolutions are not law in the strict sense, nevertheless, the general rules of interpretation have been held applicable to them. 2 Sutherland, Statutory Construction, p. 266.

The wording of the stipulation is clear. It limits the building coverage of any one block to 65% of that block. Accordingly, the answer to your question must be that this particular building will

not violate the stipulation under consideration for its construction will not exceed the 65% block coverage-minimum. This conclusion is buttressed by the fact that in the same resolution, in other places, the term "lot" was frequently used, indicating that the Planning Commission intended a distinction. McCarthy v. Board of Fire Commissioners, 37 Cal. App. 495. And certainly the terms "lot" and "block" have acquired such a technical meaning in planning that it must be concluded that when the resolution said "block" it intended the larger area as distinguished from individual lots comprising the block.

I should like to make it clear that I am only deciding the question that this particular building does not violate the stipulation under consideration. Whether this particular permit should be granted is a matter addressed to the consideration and discretion of the Planning Commission. Pursuant to the conclusions reached in my Opinion No. 845 (May 26, 1954), you have the right to pass upon the merits of this application and whether it should be granted, even though it meets all minimum requirements. In reaching your conclusion you should consider the possibilities and probabilities of future construction, its effect on adjacent homeowners and future builders, the problems raised by granting this permit, and any facts which would concern the general health, safety, comfort, convenience and welfare of the neighborhood and its inhabitants. What conclusion should be drawn, and the advisability of granting the permit being considered, are strictly matters within the discretion of the City Planning Commission, and properly determinable by it.

You are so advised.

Yours very truly,

DION R. HOLM, City Attorney.

TO: PAUL OPPERMANN, Director
of Planning
100 Larkin Street
San Francisco 2

RS/WFB

OPINION NO. 982

August 17, 1955

SUBJECT: HEALTH SERVICE SYSTEM--ELIGIBILITY FOR MEMBERSHIP IN BY TEACHERS WHO WITHDRAW THEIR CITY RETIREMENT SYSTEM CONTRIBUTIONS AND DEPOSIT THEM WITH STATE RETIREMENT SYSTEM; EFFECT OF WITHDRAWALS BY EMPLOYEES GENERALLY

Gentlemen:

I have your request for opinion as follows:

REQUEST

> "The Health Service Board, at its Regular Meeting held last night, instructed the Secretary to request of you an opinion 1) on the status of teachers withdrawing City and County Retirement funds at retirement date, for deposit with State Retirement under a new law, by which their retirement payments are in some cases materially increased.
>
> Heretofore the withdrawal of funds at retirement has been considered by this department, as by the Retirement System, a resignation, and has rendered the retiring member ineligible for further membership in the Health Service System.
>
> "2) If your opinion is that Health Service membership would be legal after such withdrawal for these teachers, is the inference to be made that all retiring employees withdrawing Retirement System funds for any reason, would be eligible, under the Charter, for continued Health Service membership?"

OPINION

In my opinion such teachers are not eligible for continued membership in the Health Service System.

Section 172.1, subd. 1, of the Charter states in material part:

> "A health service system for municipal employees is hereby established. Said system shall be

> administered by a board to be known as the health service board. The members of the system shall consist of all employees of the city and county who are members of the retirement system and all teachers and employees of the board of education who are members of said retirement system."

Subd. 3 thereof provides:

> "The board shall have power: . . .
>
> "(e) To make provision for the participation in the benefits of the system by the dependents of members, retired municipal employees and temporary municipal employees, provided that such participation shall be without cost to the city and county." (Emphasis added)

Thus persons who have ceased to be employees are eligible for continued membership in the Health Service System only if (1) they are "retired municipal employees," and (2) if the Board has exercised its power to provide for membership by persons in that category. Under the Charter an employee whose employment terminates by "retirement" cannot have Retirement System contributions refunded to him. (§§165.2 (F), 168.1.8, 171.1.8; cf. S.F. Mun. Code, §227). If a terminating employee withdraws his Retirement System contributions, his employment does not cease by "retirement." The numerous references in the Charter to "retired persons," "retired members," "member retired," "person who has retired," (§§159, 163, 163 (b), 165 (b), 165.1.1, 165.3.2, 165.2 (B), 165.2 (J), 166 (a), 168.1.2, 171.1.12), are all to employees whose employment has ceased and who have left their contributions with the Retirement System. The expression in §172.1, subd. 3 (e), "retired municipal employees," means the same. For, in the absence of anything in a statute clearly indicating a contrary intent, where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout. (Ransome-Crummey Co. v. Woodhams, 29 C.A. 356, 360; Green Inv. Co. v. McColgan, 60 C.A. 2d 224, 233; 59 C.J. 1003) Employees whose employment has ceased and who have withdrawn their Retirement System contributions are therefore not "retired municipal employees" and they may not continue as members of the Health Service System.

The Health Service Board has not been empowered, nor has it attempted, to make provision for participation in the benefits of the Health Service System by former employees who have withdrawn their contributions from the Retirement System. Under its rules and regulations the only former municipal employees for whom participation in the benefits of the Health Service System has been provided are those who have left their retirement contributions

with the Retirement System. (See Part IV, §§48-54, Rules and Regulations of the Health Service System Relating To Membership in Plan I).

You are advised that in my opinion teachers whose employment ceases and who withdraw their City and County Retirement System contributions for deposit with the State Retirement System are not eligible to continue as members of the Health Service System. The same applies to any terminating employee who, for whatever reason, withdraws his Retirement System contributions.

Respectfully submitted,

DION R. HOLM
City Attorney

GEB/LSM

To: Health Service System
61 Grove Street
San Francisco 2

Attention: Mrs. Zella B. Haynes
Secretary, Health Service Board

OPINION NO. 983
August 18, 1955

SUBJECT: SECTION 22 OF THE CITY CHARTER AS APPLIED TO THE HEALTH SERVICE BOARD AND THE MEMBERS THEREOF WITH RELATION TO THE HEALTH SERVICE SYSTEM FUNCTIONS AND OFFICE ADMINISTRATION.

Dear Sir:

I am in receipt of your request for opinion, as follows:

REQUEST

> "I am writing to ask for your written interpretation of Section 22 of the City Charter as applied to the Health Service Board and the members thereof with relation to the Health Service System functions and office administration. As you are no doubt aware, the Medical Director is appointed by the Board and serves at its pleasure, and under the Rules and Regulations, Section 8 (enclosed) 'shall be responsible to the Health Service Board for the efficient administration of the System and the Co-ordination of the various divisions of Plan I.' Does Section 22 apply, in these circumstances--particularly the second paragraph thereof?"

OPINION

The Health Service System is a department of the City and County government. (Charter §172.1, Opinion No. 3485, dated April 28, 1943; Opinion No. 529 dated April 17, 1952; Butterworth v. Boyd, 12 Cal. 2d 140)

Charter §20 provides, in part, that the chief executive appointed by each board shall have the powers and duties of a department head, except as otherwise specifically provided in this charter, and that each appointive department head shall be immediately responsible to his board for the administration of his department.

Charter §21 provides that the mayor or the board of supervisors (among others) may inquire into matters affecting the conduct of any department of the city and county, and for that purpose hold hearings, subpoena witnesses, and compel production of records.

The first paragraph of Charter §22 provides generally that, except for the purpose of inquiry, the mayor and board of supervisors shall deal with the administrative or other functions for which elective boards are responsible, solely through the board concerned, or its chief executive officer. Further that, except for the purpose of inquiry, each board in the conduct of the administrative affairs

under its control shall deal with such matters solely through its chief executive officer.

The second paragraph of Charter §22 forbids the board of supervisors, or its committees or any of its members, to dictate, suggest or interfere with appointments, promotions, compensations, disciplinary actions, contracts, requisitions for purchases, or other administrative recommendations or actions of department heads under a board. It goes on to state that the board of supervisors and each board, relative to the affairs of its own department, shall deal with administrative matters only in the manner provided by the Charter. Further that, any prohibited dictation, suggestion or interference on the part of any supervisor or member of a board is official misconduct. Provided, however, that nothing therein shall restrict the power of hearing and inquiry as provided in the Charter. (As to the power of hearing and inquiry, see §21, summarized above.)

Charter §172.1, subd. 2, states that the president of the health service board shall act as the appointing officer under the civil service provisions of the Charter for the appointing, disciplining and removal of such employees as may be authorized by the board. Subd. 3(d) authorizes the health service board to appoint a medical director who shall hold office at its pleasure. Subd. 3(c) authorizes the board to make rules and regulations for the transaction of its business.

Section 8 of the rules and regulations adopted by the health service board provides, among other things, that the medical director shall be responsible to the health service board for the efficient administration of the system; that when he deems it necessary to take disciplinary action, he shall submit his recommendations to the health service board for action; that, except for those matters under the civil service provisions of the Charter, and as otherwise provided in these rules and regulations and §172.1 of the Charter, he shall have the status of a department head immediately responsible to the health service board; and that when a vacancy exists in the position of medical director or during his absence, the secretary of the health service board shall assume the executive and administrative powers and duties of the medical director.

It is my opinion that, by virtue of the authority vested in him by §8 of the board's rules and regulations, the medical director is the board's chief executive officer and occupies the position of a department head; but he, of course, is not the appointing officer under the civil service provisions of the Charter for the appointing, disciplining and removal of such employees as may be authorized by the board. It is further my opinion that the medical director is responsible to the board for his administration of the system and

that the board should deal through the medical director with those administrative affairs of the system which do not involve the appointing, disciplining and removal of employees. Individual members of the board have not been given power to interfere with the administrative actions of the medical director and, in my opinion, should not do so. (Charter §§22, 172.1, 223)

You are advised accordingly.

Respectfully submitted,

DION R. HOLM
City Attorney

GEB:LSM

TO: Health Service System
61 Grove Street
San Francisco 2, California

OPINION NO. 984

August 19, 1955

SUBJECT: ZONING - APPEAL TO BOARD OF SUPERVISORS OF REZONING RESOLUTION OF CITY PLANNING COMMISSION; PROCEDURE OF BOARD ON ADVICE BY DIRECTOR OF PUBLIC WORKS OF INSUFFICIENCY OF SIGNATURES TO PROTEST; TIME RESTRICTION.

Gentlemen:

I am in receipt of your request for opinion dated August 16, 1955, as follows:

REQUEST

> "It is requested that you render an opinion on the following matter.
>
> "On July 7, 1955, Mrs. Elizabeth A. Lacey submitted to the Board of Supervisors an appeal from the decision of the City Planning Commission by its resolution No. 4437, adopted June 23, 1955, rezoning from first residential district to light industrial district the 800 Block on Innes Avenue, at the southeast corner of Griffith St. With the appeal Mrs. Lacey submitted a petition signed by various property owners of the area.
>
> "On July 8th the appeal was transmitted to the Director of Public Works for determination of the sufficiency of the signatures with respect to the percentage of the area represented by the appellants. On July 19th the Director of Public Works advised that the signatures had been checked and it had been found that they represented less than the 20% required. Mrs. Lacey was so informed on July 21.
>
> "Mrs. Lacey now contends that she did secure the necessary percentage of signatures.
>
> "According to the Department of Public Works, Mrs. Lacey has obtained signatures for 13% of the entire property contained in the area. It will be noted that a large portion of the area is occupied by Housing Authority property.
>
> "Based on the facts as they appear, would you kindly render your opinion as to the proper procedure to be followed in the matter."

OPINION

Charter Section 117 provides that an appeal may be taken from a decision by the City Planning Commission approving a proposed zoning change. The procedure for such an appeal is set forth in

Section 117, the pertinent part of which reads as follows:

> " . . . that appeal may be taken from the ruling of the commission by filing written protest with the board of supervisors, and if such protest is subscribed by the owners of twenty per cent of the property affected, the supervisors shall fix a time and a place for hearing such objections which shall be not less than ten nor more than thirty days after such filing, and must decide thereon within ten days of the start of such hearing, provided that, if the full membership of the board is not present on the last day on which said objections are set or continued for hearing within said period, the board may postpone said hearing and decision thereon until, but not later than, the full membership of the board is present; provided, further, that the latest date to which said hearing and decision may be postponed on such account shall not be more than ninety (90) days from the date of filing of such protest; that the supervisors, by not less than two-thirds vote, may disapprove the action of the commission, provided, however, that any change in zoning, classification or building set-back lines made by the commission on its own motion shall require approval of the supervisors by a two-thirds vote; that in case of disapproval by the commission or by the supervisors on appeal of a proposed change, such proposed change may not be resubmitted to or reconsidered by the commission for at least one year."

Section 117 requires that the appeal be filed with the Board of Supervisors within thirty days after the Planning Commission resolution approving the change, and that it be subscribed by the owners of 20% of the property affected in order to be perfected. The "property affected" is all the property located within 300 feet of all exterior boundaries of the area affected by the proposed change. Charter Section 117; S.F. City Attorney's Opinion No. 506 (February 4, 1952).

Section 46 of the City Planning Code requires that as soon as the appeal is received by the Board of Supervisors it shall be sent to the City Engineer, who must check the percentages and area affected and report to the Board as to the percentage of the owners of the property affected who have joined in said protest. Section 46, Article 2, Chapter II, Part II, San Francisco Municipal Code.

Section 117 of the Charter provides that "*if* such protest [appeal] is subscribed by the owners of twenty per cent of the property affected, the Supervisors shall fix a time and a place for hearing such objections which shall be notless than ten nor more than thirty days after such filing." (Italics added.)

The City Engineer is merely the investigative or technical aid of the Board and the eventual determination of the jurisdiction of the Board (the 20%) and the merits of the appeal are matters properly determinable by the Board.

Section 117 provides that the Supervisors shall fix this time and place for hearing only *if* such protest is subscribed by the required 20% of owners. This requirement necessarily means that the Board must first determine that the appeal has been perfected by acquiring this jurisdictional 20% of property owners. Therefore, when an appeal is filed, the matter should be calendared for a Board of Supervisors meeting. At that meeting the report of the City Engineer is to be considered along with any communication on this subject on the part of the protestants, and a determination made as to whether the required 20% has been obtained. If the Board determines that the "protest is subscribed by the owners of twenty per cent of the property affected," they [the Supervisors] "shall fix a time and place for hearing such objections which shall be not less than ten nor more than thirty days after [the] filing." That determination is made affirmatively or negatively by an affirmative or negative vote on the resolution fixing the time and place of hearing. If the Board finds the necessary 20% has not been obtained, under Section 117, it cannot set a time and place for hearing.

In the instant case, I have conducted an investigation into the appeal. I have discovered that a large portion of the property affected is occupied by Housing Authority property. Mrs. Lacey's appeal must necessarily fail if this housing project property is includable in determining the ownership percentage. This housing authority property must be included in computing the percentage of owners of affected property who have signed. Property owned by the State is includable in computing the percentage. *S.F. City Attorney's Opinion No. 132* (May 15, 1950). All the reasoning which necessitated such a holding is applicable here and more emphatically so. The Housing Authority is "a public body corporate and politic." *The Housing Authority v. Dockweiler*, 14 Cal. 2d 437, 443 (1939); *Health and Safety Code Sections 34240, 34310*. As such it is a State agency and is not an agent of the city in which it functions. *Housing Authority v. Los Angeles*, 38 Cal. 2d 853 (1952). It is administered by and acts through a Board, much the same as a private corporation is administered by a Board of Directors. *Health and Safety Code Sections 34270-34283, 34310, et seq.* All housing projects constructed under the Authority are specifically made subject to the "*planning, zoning,* sanitary, and building laws, ordinances, regulations applicable to the locality in which the housing project is situated." (Italics added.) *Health and Safety Code Section 34326*; *The Housing Authority v. Dockweiler*, *supra*, p. 444.

The members of the Board act for the Authority and are required to make the decisions necessary to protect and safeguard the general safety, comfort, health and welfare of the inhabitants of the project. In the instant case, the housing project represents a very substantial portion of the property affected and has every right to be included in any zoning change or proposal which might affect the area or its people or any of its affairs. In fact, the projects are specifically made subject to the planning and zoning laws, ordinances and regulations of the municipality. *Health and*

Safety Code Section 34326; The Housing Authority v. Dockweiler, supra. It would be most inequitable and prejudicial to the Authority and its inhabitants to exclude so substantial a part of the area affected and its citizens from any participation in zoning matters.

The housing project property is clearly includable in computing the percentages. With such property included, Mrs. Lacey has only 13% of the property affected, far below the required 20%.

In view of what has been said above, it is my opinion that the Board, legally, could reach only one conclusion in this matter, i.e., that Mrs. Lacey did not have the required 20%, that the Board was without jurisdiction for this reason and, therefore, that it cannot fix a time and place for hearing. To calendar the matter for the purpose of fixing a time and place for hearing would be an idle act. Since the law does not require idle acts, you are advised that Mrs. Lacey should be informed that the Board of Supervisors has no jurisdiction to consider the appeal.

You are so advised.

Respectfully submitted,

DION R. HOLM, City Attorney

TO: BOARD OF SUPERVISORS
235 City Hall
San Francisco 2

Attention: Mr. John R. McGrath,
Clerk of the Board.

RS/LSM

August 23, 1955

Board of Supervisors
235 City Hall
San Francisco 2

Re: Proposed amendment to Charter Section 6

Dear Madam and Gentlemen:

At the meeting of your Honorable Board of August 22, 1955, request was made that this office confirm in writing the oral advice therein given to the effect that the proposed amendment to Charter Section 6, allowing absence from the state by city and county officers for not more than twenty-one (21) days, without the necessity for procuring permission therefor from the Mayor and the Board of Supervisors, would not operate to abrogate your rule requiring that a supervisor must first obtain Board consent to be absent from a meeting.

Please be informed that such is the considered opinion of this office. The rule of your Board and the proposed amendment to Section 6 are completely compatible, and, in reality, have to do with different subjects. Your rule, being allowed by the provisions of Charter Section 19, has the force and effect of law and has a dignity equal with a charter provision. (Viner v. Civil Service Commn., 59 Cal. App. (2) 458; Bruce v. Civil Service Board, 6 Cal. App. (2) 633; Mitchell v. McKevitt, 128 Cal. App. 458) Since your rule deals with a particular subject, i.e., absence of a supervisor from a meeting, it is deemed to control, for its own purposes, the general subject contained in the proposed charter amendment, i.e., absence from the state of city and county officers in general.

Hence, it is my conclusion that if the proposed amendment to Charter Section 6 be adopted, it will not effect an abrogation of the Board of Supervisors rule in question.

Of course, if a supervisor made and was granted a request, pursuant to the proposed amendment (assuming its adoption), to absent himself from the state for a period longer than 21 days, such consent would implicitly include Board consent for absence from meetings during the period provided for absence from the state. That is, the Board consent would be for all purposes for which consent would be required.

Yours truly,

DION R. HOLM
City Attorney

WFB ec

OPINION NO. 985

September 2, 1955

SUBJECT: EFFECT OF ARTICLE 8 CHAPTER 5, PART 2, DIV. 2, TITLE 3, GOVERNMENT CODE (A.B. 3757, 1955 LEGISLATURE) RELATING TO REAL ESTATE COMMISSIONS ON PROCEDURE OF CITY AND COUNTY IN SALE AND LEASE OF REAL PROPERTY.

Dear Sir:

This opinion comes in response to your request as follows:

REQUEST

"Attached hereto is copy of a communication received from the San Francisco Real Estate Board, dated August 1, 1955, relative to Assembly Bill 3757, passed by the 1955 Legislature, which authorizes a board of supervisors to sell or lease real property and to pay real estate brokers commissions for their services in developing sales or leases.

"The Director of Property is of the opinion that under Sections 3 and 92 of the Charter this new State law may not apply to the City and County of San Francisco.

"At its meeting on Wednesday, August 11, 1955, the Finance Committee directed that this communication be sent to you with the request that you furnish an opinion as to the effect of this new State legislation upon the procedure of the City and County of San Francisco for the sale or lease of real property."

OPINION

Assembly Bill 3757, enacted into law by the 1955 Legislature, does purport to prescribe the procedure by which counties of the state may sell or lease real properties belonging to them and pay commissions to licensed real estate brokers who render services in such transactions. However, I interpret such legislation to be upon a matter strictly municipal in character and applicable only to those counties which do not have charter provisions or local legislation governing such transactions.

You will find that Sections 92 and 93 of our City Charter clearly outline the procedure by which real property generally belonging to the City and County may be sold or leased and it vests such power in the Director of Property and the Board of Supervisors. Likewise Section 42 of the City Charter vests in the Recreation and Park Commission certain leasing powers with respect to the particular

real properties under its special jurisdiction, subject to approval by the Board of Supervisors. The same situation applies also to the selling or leasing of public utility properties under Section 123 of the City Charter.

Believing, therefore, that such sales or leases fall strictly within the category of municipal affairs and that said sections of our City Charter prescribe fully and completely the manner in which such transactions are to be handled by the City and County, I am constrained to hold that said Charter provisions are controlling as to all such transactions and that said new general state law is wholly inapplicable to San Francisco. (See Loop Lumber Co. v. Van Loben Sels, 173 Cal. 228, 232; Mefford v. City of Tulare, 102 C.A. 2d 919; Kennedy v. Ross, 28 Cal. 2d 569; West Coast Advertising Co. v. San Francisco, 14 Cal. 2d 516, 521.)

You are advised accordingly.

Respectfully submitted,

DION R. HOLM
City Attorney

RJR/NSW

To: John R. McGrath
Clerk of the Board of Supervisors
235 City Hall
San Francisco 2

Opinion No. 986
September 8, 1955

SUBJECT: GAS TAX FUNDS, USE OF, FOR CONSTRUCTION OF EXPRESS WAYS AND SUBWAYS WHERE DESIGNATED AS MAJOR CITY STREETS.

Dear Sir:

This office is in receipt of a request for opinion as follows:

REQUEST

> "I am enclosing correspondence received from the State Legislative Counsel in which it is stated that the use of gas tax funds for the purpose of constructing expressways or other streets accepted by the local Department of Public Works is legal.
>
> "In view of this opinion which appears to conflict with your own previous opinion would you be good enough to advise further as I would like to pursue this matter to a conclusion."

OPINION

In order to assist and advise you for the purposes stated in your request, it is necessary to review the previous correspondence directed to me by you on this subject and my replies thereto. On May 31, 1955 I received a letter from you which read as follows:

> "Sometime ago your office was questioned regarding the possibility of using Gas Tax Funds for the direct or indirect improvement of our transit facilities. Would you be good enough in this regard to inform me at your earliest convenience whether such funds might presently be used for such purposes, including construction of elevated expressways, Monorail, etc. If a constitutional amendment is required for such use would you please be good enough to advise as I would like to submit the legislation for that purpose."

In my reply to this letter, I reviewed the legality of the use of gas tax funds for the improvement of "our transit facilities" including the construction of "elevated expressways, Monorail, etc." I advised you at that time that gas tax funds could not be used for such purposes, citing the provisions of the California Constitution, the various statutes of the State of California and the opinion of the Supreme Court of the State of Massachusetts where a similar question concerning the use of gas tax moneys for transit facilities was discussed and declared to be an illegal use of these funds.

Some time thereafter you referred to me a newspaper clipping which recited that the Legislature had authorized, from gas tax funds, the purchase of a new ferryboat for the Benecia-Martinez ferry. In my reply I advised you that I had investigated the question of this use of gasoline funds and found that the act of the Legislature was in no way contrary to my earlier advice to you on the subject of gas tax funds for the improvement of transit facilities. The funds, which were authorized to be used by the Legislature, for the purchase of this ferryboat, while derived from the same source as those which are allocated to cities and counties for maintenance, repair and construction of streets and highways, were actually allocated from the county's share of that portion of the tax fund which is entrusted to the State Department of Public Works for the construction and maintenance of state highways in counties in accordance with the so-called Mayo formula. A review of Opinion 2 of the Legislative Counsel, which was enclosed with your request and which covers the Benecia-Martinez ferry, indicates that the Legislative Counsel is in complete accord with my reply to your inquiry concerning the purchase of the ferryboat and the operation of the Benecia-Martinez ferry. I shall, therefore, direct myself solely to a discussion of Opinion 1 of the Legislative Counsel which in your request you indicate may be in conflict with the advice that I have previously given you on this subject.

I wish to specifically direct your attention to the question that was proposed to the Legislative Counsel by Assemblyman Charles W. Meyers and which is designated as Question No. 1, and to which Opinion No. 1 is a reply.

This question reads as follows:

> "May San Francisco use its allotment of gas tax funds for the construction of a subway or elevated expressway from one end of the city to the other for the use of buses and other vehicular traffic?" (Emphasis Added)

Your original request to me covered the use of these funds for the extension of the municipal transit system, including construction of elevated expressways, monorail, etc. I am in complete accord with the opinion of the Legislative Counsel in answer to the question directed to him concerning the use of these funds for the construction of subways or elevated expressways which would be open not only to buses but all vehicular traffic, and would be designated and classified as major city streets.

The Legislative Counsel's opinion in no way authorizes use of gas tax funds for monorail, subways, etc. which will not be used by vehicular traffic. Article XXVI does not permit use of gas tax money for "structures . . . adapted exclusively for use by the cars of the . . . Transit Authority and of which motor vehicles could make no use." See In re Opinion of the Justices, 85 N.E. 2d 761 (Mass. 1949).

If your plan proposes to construct a new elevated expressway or a subway from one end of San Francisco to the other, which will be designated as a major city street, upon which all vehicular traffic will be permitted, then such a use of gas tax funds would be legal and proper. If it proposes to expend it for monorail, train subways, etc., on which vehicular traffic is not permitted, it would not be proper.

I hope that this opinion will assist you in pursuing this entire matter to the conclusion that you are seeking. If you desire any further advice on this matter, I would be happy to comply.

Respectfully submitted,

DION R. HOLM
City Attorney

BJW/RS

TO: GEO. CHRISTOPHER, President,
Board of Supervisors
235 City Hall
San Francisco 2.

OPINION NO. 987

September 14, 1955

SUBJECT: WAR MEMORIAL MANAGEMENT'S RIGHT TO ESTABLISH NORMAL WORK SCHEDULE FOR JANITORS FOR FIVE CONSECUTIVE DAYS COMMENCING TUESDAY AND ENDING ON SATURDAY.

Gentlemen:

This office is in receipt of a request for opinion as follows:

REQUEST

"Until this year all of the Janitors in the War Memorial and Opera House were on a 5-1/2 work week, receiving extra pay at straight time rates for the extra half day. In the current fiscal year only four of the janitors are on a 5-1/2 day. The Board of Supervisors increased the janitorial staff by two employments as of July 1, as an offset to the elimination of the 5-1/2-day work week.

"It has been suggested that the janitorial staff in the Opera House be divided into two groups. One group to work Monday through Friday and the other to work Tuesday through Saturday. This would be done under the provisions of Section II (a) of the salary standardization ordinance reading as follows:

> "'(a) Normal Work Schedules: A normal work day for employees whose compensations are fixed in the schedules of compensation shall consist of a tour of duty of eight hours completed within nine hours and a normal work week for employees whose compensations are fixed herein on a monthly basis shall consist of such tours of duty on each of five consecutive days a week except as herein provided; and provided that on operations normally conducted on a five-day per week basis, the normal work week shall consist of such tours of duty Monday through Friday.'

"Objection has been made by the representative of some of the janitors who state that the work week must be Monday through Friday only and that under Section II (b2) of the salary standardization ordinance, any deviation from that schedule requires the approval of the Civil Service Commission.

"The Commission would appreciate receiving your advice as follows:

"1) May the War Memorial management establish a normal work schedule for Janitors of five consecutive days, Tuesday through Saturday for a portion of the staff?

"2) Would such action require the approval of the Civil Service Commission or other authority except management?"

OPINION

The facts as stated in your request indicate that the War Memorial is not an operation normally conducted on a five-day week basis. Telephone conversations with the Managing Director, Mr. Edward Sharkey, indicate that the Veterans Building is open every Saturday for the 52 weeks of the year and that the Opera House was operated in excess of five days for 35 weeks during the 1954-1955 fiscal year and present bookings indicate a similar situation for the fiscal year 1955-1956. These facts support the conclusion that the War Memorial, consisting of the Opera House and the Veterans Building, does not come within the normal five-day week operation contemplated by Section II (a) of the Salary Standardization Ordinance, which reads as follows:

> "Normal Work Schedules: A normal work day for employees whose compensations are fixed in the schedule of compensation shall consist of a tour of duty of eight hours completed within nine hours and a normal work week for employees whose compensations are fixed herein on a monthly basis shall consist of such tours of duty on each of five consecutive days a week except as herein provided; and provided that on operations normally conducted on a five-day per week basis, the normal work week shall consist of such tours of duty Monday through Friday."

The language of this section provides for five consecutive days of work for each person whose compensation is fixed by the Salary Standardization Ordinance. The section of the ordinance quoted above only requires that these five days begin on Monday and end on Friday where the operation is normally for five days a week. Section II (b) contains certain exceptions to Section II (a) which, in my opinion, are not applicable to the present situation. The first situation, Section II(b)1), applies only to the San Francisco Hospital Laundry. The second situation, Section II (b) 2), applies

to work schedules on operations at remote locations or where changes in shifts are made periodically. Neither of these situations prevail at the War Memorial. The remaining subsections of Section II (b) have no application to the present facts.

Based on the information furnished in your request and the additional data obtained from Mr. Sharkey, I advise you as follows:

1. Under the provisions of Section II (a) of the Salary Standardization Ordinance for 1955-1956 and the facts concerning the War Memorial operation, the Managing Director may establish a work schedule for a portion of the staff for the period Tuesday through Saturday, inclusive.

2. The act of the Managing Director in so establishing this work schedule does not require any approval by the Civil Service Commission.

Respectfully submitted,

DION R. HOLM
City Attorney

BJW/RJR

TO: Civil Service Commission
151 City Hall
San Francisco 2

Attention: William L. Henderson
Personnel Director
and Secretary

OPINION NO. 988

September 14, 1955

SUBJECT: BAY AREA AIR POLLUTION CONTROL DISTRICT; MAYOR'S DUTY IN RE APPOINTMENT OF MEMBER OF BOARD OF DIRECTORS; DUTIES OF MEMBER OF BOARD.

Dear Mayor:

This comes in response to your recent request for an opinion as follows:

REQUEST

> "It has been called to my attention that I will have the responsibility of appointing a member to the Board of Directors of the Bay Area Air Pollution Control District later this year under provisions of Assembly Bill No. 3545, which has been signed by Governor Knight.
>
> "It would seem from a preliminary study of the text of the bill that I am to make my appointment on October 28, 1955 'from among the Mayors and city councilmen' within the City and County of San Francisco. Would you please advise me fully as to my responsibility in this matter, as well as how and when it should be carried out.
>
> "Please also provide me with an interpretation of the duties and responsibilities of the member of the board of directors that I will appoint, since these are factors to be considered in making such an appointment."

OPINION

Answering the first phase of your request, my opinion is that the new Bay Area Air Pollution Control Law places upon the Mayor of the City and County of San Francisco the following responsibilities:

1. To serve as the "City Selection Committee" under Chapter 2.5, Section 24351.

2. To hold as such committee a meeting on October 28, 1955, at 10 a.m. in the chambers of the Board of Supervisors to appoint a member of the Board of Supervisors as a member of the Board of Directors of the Bay Area Air Pollution Control

District under Sections 24351.2 and 24351.3 of said chapter for a term ending June 1, 1956. Inasmuch as you are the only member of the City Selection Committee in San Francisco, I believe you may make substantial compliance with said sections by simply notifying the County Clerk to meet you in the chambers of the Board of Supervisors on said date at 10 a.m. and record with him your appointment.

3. To make succeeding appointments to said Board of Directors for two-year terms on the second Monday in May of each even-numbered year in the presence of the County Clerk and with him acting as the recording officer.

4. To fill vacancies when they occur upon said Board of Directors within the scope of his appointing power and to remove at pleasure any such member under Section 24352 of said chapter. Said section also provides that when four-fifths of the Board of Supervisors request the removal of a member of the Board of Directors appointed by the Mayor, it becomes the duty of the Mayor to consider the removal of such member within 20 days.

The last phase of your request calls for my interpretation of the duties and responsibilities of members of the Board of Directors. In the main, I believe the crux of their duty is expressed in Section 24354.1 of Article 6, as follows:

> "The district shall establish and execute an effective program for the reduction of air contaminants within the district."

However, it would seem that the Board's first-year task will be largely occupied with conducting, or causing to be conducted, sufficient studies and surveys upon which to base and pass a resolution of necessity for controlling air contaminants within the Bay Area district. The law specifies that this may not be done until after October 1, 1956 and such resolution is prerequisite to the Board adopting enforceable orders, rules and regulations of its own regarding the control of air contaminants. This, of course, will devolve upon the Board many legal, scientific, and other technical problems, and the choosing of a competent staff to carry on its work, including the doing of

a good public relations job. This may be readily discerned in the designation of purpose and duties as set forth in Articles 2, 6, 7, 8, 9, 10, 11 and 14 of the law, and I respectfully refer you to those Articles for gleaning a more detailed picture of the duties involved.

Respectfully submitted,

DION R. HOLM
City Attorney

RJR/TJB

TO: The Honorable Elmer E. Robinson
Mayor of the City and County of
San Francisco
200 City Hall
San Francisco 2

OPINION NO. 989

September 14, 1955

SUBJECT: BAY AREA AIR POLLUTION CONTROL DISTRICT, PROCEDURAL STEPS FOR AND TIMES FOR THEIR EXECUTION; ASSEMBLY BILL NO. 3545

Dear Madam:

I have before me your request, as follows:

REQUEST

> "Now that Assembly Bill No. 3545 has been approved by Governor Knight, creating the Bay Area Pollution Control District, will you please prepare and submit to me as soon as possible, an outline and digest indicating the procedural steps and the times for their execution, required by the provisions of the law referred to."

OPINION

Assembly Bill No. 3545, enacted into law by the 1955 Legislature, created a Bay Area Air Pollution Control District comprising the counties of Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, Solano, and Sonoma. I note, however, that Napa, Solano and Sonoma counties are exempted from the exercise of its powers until such time as the governing bodies of said counties adopt a resolution of need for it to function in their respective counties, and file a certified copy thereof with the District Board.

Procedural steps, however, are prescribed for the District to transact business and exercise its powers after September 7, 1955, the effective date of the law, in the other counties named, in the following manner:

1. By the creation of City Selection Committees in each of said counties under Article 4.5 of the law consisting of the Mayor of each city within each of such counties or, where there is no Mayor, the Chairman or President of the City Council.

Insofar as the City and County of San Francisco is concerned, this Article imposes upon our Mayor as such City Selection Committee for the City and County of San Francisco, certain duties and responsibilities which I have already set forth in Opinion No. 988 of this office at the request of the Mayor, a copy of which is attached hereto.

2. In addition to the members of the Board of Directors of the District appointed by the various City Selection Committees, Article 5 of the law prescribes that on or before October 28, 1955, the Board of Supervisors of each of the participating counties shall appoint one of its members to be a member of said Board. This clearly imposes upon the Board of Supervisors of the City and County of San Francisco a duty of compliance in making such an appointment.

Said Article 5 further prescribes that the District Board of Directors so selected shall hold office until June 1, 1956, and that thereafter each member appointed by the Board of Supervisors shall hold office for a term of four years, and that each member appointed by the City Selection Committee shall hold office for two years. It also clearly prescribes a method for filling vacancies on the Board and for effecting removals therefrom.

3. Although not a procedure made incumbent upon the Board of Supervisors, it may be helpful for me to observe generally that much of the remainder of the law deals with the powers and duties of the Board of Directors itself in bringing to pass "an effective program for the reduction of air contaminants within the district"; that it enjoins the Board from promulgating any enforceable orders, rules or regulations of its own in the establishment of such a program until after it adopts a resolution of necessity for such action; and further that such a resolution may not be adopted until after October 1, 1956, nor until the Board conducts certain surveys, studies and public hearings to provide a factual basis upon which such a resolution may properly be founded.

4. Another item of the law which seems pertinent to your inquiry is the provision of Article 14 which directs the District Board of Directors, before June 15 of each year, to determine the amount of money required by the District for its purposes during the ensuing fiscal year and to apportion it in a prescribed manner to the counties of the District, and on or before said date to inform the Board of Supervisors of said county of the amount of apportionment to the county. Thereupon, each Board of Supervisors shall levy an ad valorem tax on the taxable real property within the county included within the District sufficient to secure the amount so apportioned to it and such taxes shall be levied and collected for county purposes and paid to the treasurer of each of the counties to the credit of the District. The law also provides that prior to the first receipts of the District of revenue from taxation the counties may loan any available money to the District for its purposes subject to repayment out of the first revenues received from taxation.

The law, of course, contains many other provisions but I shall refrain from discussion of them here as not being particularly pertinent to your present inquiry.

I do, however, feel obliged to call to your attention Public Law 159, enacted by the 84th Congress, entitled "Air Pollution Control - Research and Technical Assistance," which includes several provisions which will enable the Board of Directors, which you are sharing in the appointment of, to call upon the Surgeon General of the United States Public Health Service for much assistance in conducting helpful investigations, surveys and research, and in procuring grants-in-aid for the work it is scheduled to perform.

Respectfully submitted,

DION R. HOLM
City Attorney

RJR/TJB

TO: Hon. Clarissa Shortall McMahon
Chairman, Health Committee,
Board of Supervisors
235 City Hall, San Francisco 2

OPINION NO. 990
September 16, 1955

SUBJECT: POWER OF DIRECTOR OF PUBLIC WORKS TO VACATE AN UNSAFE BUILDING; SECS. 102, 104 and 804, BUILDING CODE.

Dear Sir:

I am in receipt of your letter of August 10, 1955, requesting an opinion as follows:

REQUEST

> "The properties designated as 2304-6, 2308-10, and 2312-14 Fillmore Street have been considered for condemnation under the provisions of Sec. 804 of the building code. These three buildings were in the process of being altered, but the alterations have been abandoned. The owner of the property maintains as an excuse for the discontinuance of repairs an alleged unsafe condition, and the encroachment of a retaining and foundation wall of the adjoining property. His contention is that a temporary shoring of the unsafe wall is so placed as to interfere with the construction of the rear stairs which are necessary for his buildings.
>
> "The buildings in question are at present occupied in part, and it is considered by this department that the means of egress are inadequate, and it is our opinion that the buildings should be vacated. Your opinion is therefore requested on the following:
>
> "1. Has the Director of Public Works the power to vacate a building which is considered unsafe due to inadequate means of egress without proceeding under the provisions of Sec. 804 of the building code and condemning the building?
>
> "2. Does Sec. 102 or Sec. 104 of the building code give the Director implied power to vacate an unsafe structure?"

OPINION

The procedure to be followed in the vacating of an unsafe building is prescribed in Section 804 of the Building Code.

Section 804 of the Building Code provides in part as follows:

> "(a) General. All buildings, structures or parts thereof which are structurally unsafe or not provided with adequate egress, or which constitute a fire hazard, or are otherwise dangerous to human life, or which in relation to existing approved use constitute a hazard to safety by reason of inadequate maintenance, dilapidation, obsolescence, or abandonment, or are hereafter erected, constructed or maintained in violation of this code are, for the purpose of this section, unsafe buildings. All such unsafe buildings are hereby declared to be public nuisances and shall be abated by the Director as hereinafter provided." (emphasis added)

Subsections (b), (c), (d) and (e), respectively, provide for the filing by the Superintendent of a written complaint with the Director, notice of hearing, decision of the Director upon conclusion of said hearing, and order of vacation by the Director upon his determination and finding that the building or part thereof complained of is a public nuisance.

It is my opinion that the word "shall" where underlined allows no exercise of discretion, since a full reading of the section demonstrates a clear intent that the following of the procedure as prescribed is mandatory.

I, therefore, conclude that the Director of Public Works does not have the power to vacate a building which is unsafe due to inadequate means of egress without proceeding under the provisions of Sec. 804 of the Building Code.

Secs. 102 and 104 of the Building Code appear in Chap. I, Article 1 entitled "Title and Scope", under the respective headings of "Purpose" and "Maintenance". The aforementioned sections do not give the Director implied power to vacate an unsafe structure in that said power is expressly conferred by Sec. 804, Chap. I, Article 8, dealing with enforcement of the Code.

You are advised accordingly.

Respectfully submitted,

DION R. HOLM
City Attorney

JC/TJB

To: Sherman P. Duckel, Director
Department of Public Works

cc: Thomas A. Brooks
Chief Administrative Officer

OPINION NO. 991

September 16, 1955

SUBJECT: REDEVELOPMENT PLAN FOR DIAMOND HEIGHTS; OWNER PARTICIPATION ON CONDITION OF SALE TO AGENCY OF SEGMENT OR PORTION OF HIS PROPERTY AT FAIR MARKET VALUE AS ESTABLISHED BY AGENCY, VALIDITY OF CONDITION.

Gentlemen:

This office is in receipt of your request for opinion as follows:

REQUEST

> "At its meeting on Wednesday, September 7, 1955, the Finance Committee had for consideration a proposed ordinance to approve the Final Plan for the Diamond Heights Redevelopment Project.
>
> "At the meeting referred to Mr. Jack Werchick, representing certain property owners in the area affected, contended that the Redevelopment Plan for Diamond Heights proposed for approval by the ordinance referred to, contains a certain unconstitutional condition.
>
> "By direction of the Finance Committee this is to request that, as soon as possible, you furnish your opinion concerning Mr. Werchick's contention, which is as follows:
>
> > "That the provisions of the Redevelopment Plan requiring the present owner of improved property to elect to participate in the proposed redevelopment on the condition that such owner sell such portion of his property as is needed by the Agency at 'fair market value as established by the Agency' is an unlawful and unconstitutional provision in that it imposes an unconstitutional condition upon the present owner as a prerequisite to participation. While under certain circumstances a public agency may exclude certain persons from participation, such agency may not grant the right of participation upon unconstitutional conditions. In this case, the agency may not require the waiver of the right to judicial determination of the fair market value of the property as a condition of participation.
> >
> > "Your compliance with this request will be appreciated."

OPINION

Discussion has been had with the Redevelopment Agency relative to the contents of the owner participation agreements which the Agency proposes to execute. The Agency will establish the

fair market value of the small segments or portions of land to be either purchased from or sold to an owner participant, only after securing independent appraisals by competent appraisers and after negotiations with the property owner.

I have carefully reviewed the Redevelopment Plan for Diamond Heights Approved Redevelopment Project Area B-1 and it is my opinion that such plan meets all of the requirements of State and Federal law.

The right of an owner to participate in the redevelopment of his property in conformity with a redevelopment plan arises only by virtue of certain provisions of the California Community Redevelopment Law.

These provisions are contained in the following sections of the Community Redevelopment Law (Health and Safety Code):

> "Sec. 33701. Property owners' participation in redevelopment: May submit alternative plan. Every redevelopment plan shall provide for participation in the redevelopment of property in the project area by the owners of all or part of such property if the owners agree to participate in the redevelopment in conformity with the redevelopment plan adopted by the legislative body for the area. This section does not prohibit the owners from submitting an alternative plan pursuant to this part."

> "Sec. 33702. Same: Nonparticipation: Alternative provisions. Every redevelopment plan which contemplates property owner participation in the redevelopment shall contain alternative provisions for redevelopment of the property if the owners fail to participate in the redevelopment as agreed."

> "Sec. 33745. Nonparticipation by owners: Effectiveness of alternative provisions under §33702: Extension of 30-day period. If the redevelopment plan adopted provides for participation in the redevelopment of property in the area by the owners of such property, and if for 30 days after the adoption of the plan, the owners fail or refuse to enter into a binding agreement for participation in accordance with the plan, the alternative provisions provided for in Section 33702 become effective as the official redevelopment plan of the project area. The legislative body may extend the 30-day period by not more than 60 days."

> "Sec. 33275. Existing buildings to be continued on land: Owner's nonparticipation in redevelopment plan as justifying acquisition by agency. Without the consent of the owner, an agency shall not acquire any real property

> on which existing buildings are to be continued on their present site and in their present form and use, unless they require alteration, improvement, modernization, or rehabilitation under the redevelopment plan and the owner fails or refuses to agree to participate in the redevelopment plan pursuant to Sections 33701 and 33745."

Section 33275 as referred to above was deleted by the Legislature in 1955 and the following Section 33275 enacted in lieu thereof:

> "Sec. 33275. Without the consent of an owner an agency shall not acquire any real property on which an existing building is to be continued on its present site and in its present form and use unless such building requires structural alteration, improvement, modernization or rehabilitation, or the site or lot on which the building is situated requires modification in size, shape or use or it is necessary to impose upon such property any of the standards, restrictions and controls of the plan and the owner fails or refuses to agree to participate in the redevelopment plan pursuant to Sections 33701 and 33745."

The Community Redevelopment Law does not define or specify the manner in which an owner of land in a project area may participate in the redevelopment of his property.

Every statute should be construed with reference to the purpose and objectives intended to be accomplished by it. The language will be so interpreted, if possible, as to aid the design and intent of the legislature. (23 Cal. Jur. 764.)

In order to properly interpret the intent of the legislature regarding "owner participation," the above referred to sections must be read together.

It is apparent from these sections:

(a) that the right to participate is not available to all property owners in the area but is only available where participation is practical and feasible under the plan -- hence the language "Every redevelopment plan shall provide for participation in the redevelopment of property in the project area by the owners of all or part of such property . . ." in Section 33702;

(b) that the legislature contemplated that there would be redevelopment plans which do not provide for "owner participation" -- hence the language in Section 33702 "Every redevelopment plan which contemplates property owner participation . . .," and the language in Section 33745 "If the redevelopment plan adopted provides for participation . . .";

(c) Inasmuch as the legislature did not define the manner in which participation should be accomplished, the legislature intended that the Agency should have discretion in providing the method and terms of participation, thus leaving to the Agency the preparation of plans and specifications to accomplish the desired results. Every redevelopment project is different and varies and the legislature could not draft a blueprint for each project;

(d) that the legislature intended the owners of property would have to agree to participate according to the provisions of the plan -- hence the language in Section 33701 -- "if the owners agree to participate in the redevelopment . . .," in Section 33702: "if the owners fail to participate in the redevelopment as agreed," and in Section 33745: "and if for 30 days after the adoption of the plan the owners fail or refuse to enter into a binding agreement . . .";

(e) that the Agency has discretion in drafting plans consistent with the Redevelopment Law and the overall purpose of redevelopment of project areas and that an owner of property must sign an agreement to participate within 30 days after the adoption of the plan or lose his right to participate (Sec. 33702). If the legislature intended that resort to court action be had regarding the "owner participation" provisions of Redevelopment Plans it would not have provided that an agreement be signed within 30 days after adoption of such plans. Court action within that time would be an impossibility.

In drafting the Redevelopment Plan for Diamond Heights the Redevelopment Agency has given every consideration to the rights of existing property owners consistent with the overall development of the area.

In Redevelopment Agency of the City and County of San Francisco v. Hayes (involving the constitutionality of the California Community Redevelopment Law as applied to the Diamond Heights Project, 122 C.A. 2d 777 (Cert. denied by U.S. Supreme Ct. in Van Hoff v. Redevelopment Agency, 348 U.S. No. 2, 897) the court stated at page 807:

> "'The fact is, however, that the act contains as definite a description of what constitutes a blighted area as it is reasonably possible to express; in regard to such factors as the selection and the size of the areas to be redeveloped, the costs involved, and the exact form which the redevelopment in any particular case is to take, it was obviously impossible for the legislature to make detailed provisions or blueprints in advance for each operation . . . All that the legislature could do, therefore, was to prescribe general rules and reasonably definite standards, leaving to the local authorities the preparation of the plans and specifications best adapted

> *to accomplish in each instance the desired result, a function which obviously can be performed only by administrative bodies. While the legislature cannot delegate the power to make a law, it may, where necessary, confer authority and discretion in connection with the execution of the law; it may establish primary standards and impose upon others the duty to carry out the declared legislative policy in accordance with the general provisions of the act.*'" (Emphasis ours.)

In *Berman v. Parker* (decided by the U.S. Supreme Court December, *1954), 348 U.S.* No. 1, p. 26, the court stated at pages 33, 34, 35, and 36:

> "It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.
>
> "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end." . . . .
>
> "What we have said also disposes of any contention concerning the fact that certain property owners in the area may be permitted to repurchase their properties for redevelopment in harmony with the overall plan. That, too, is a legitimate means which Congress and its agencies may adopt, if they choose.
>
> "In the present case, Congress and its authorized agencies attack the problem of the blighted parts of the community on an area rather than on a structure-by-structure basis." . . . .
>
> "Property may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending. But we have said enough to indicate that it is the need of the area as a whole which Congress and its agencies are evaluating. *If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly. The argument pressed on us is, indeed, a*

> plea to substitute the landowner's standard of the *public need for the standard prescribed by Congress. But as we have already stated, community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis -- lot by lot, building by building.*
>
> "It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. *Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.*" (Emphasis added.) . . . .
>
> "If the Agency considers it necessary in carrying out the redevelopment project to take full title to the real property involved, it may do so. It is not for the courts to determine whether it is necessary for successful consummation of the project that unsafe, unsightly, or insanitary buildings alone be taken or whether title to the land be included, any more than it is the function of the courts to sort and choose among the various parcels selected for condemnation."

If an owner of property fails or refuses to enter into a participation agreement in accordance with the Redevelopment Plan, the alternative provisions of the plan become effective. The Agency may acquire the property of such owner, by condemnation if necessary. In such event the Constitution guarantees to the owner just compensation.

It is therefore my opinion, based on the above, that the provisions of the redevelopment plan providing for owner participation and particularly the provisions providing for the Agency to establish the fair market value of the small segments or portions of land to be purchased from or sold to a participating owner are not violative of the Fifth and Fourteenth Amendments of the Constitution of the United States.

Respectfully submitted,

DION R. HOLM, City Attorney.

TO: FINANCE COMMITTEE, Board
of Supervisors
235 City Hall, San Francisco 2

MG/JEB

OPINION NO. 992

September 20, 1955

SUBJECT: REDEVELOPMENT PLAN FOR DIAMOND HEIGHTS -- RIGHTS OF OWNERS OF UNIMPROVED PROPERTIES TO PARTICIPATE IN REDEVELOPMENT WHERE LOT LINES CHANGE, STREETS ARE INSTALLED, GRADING IS NECESSARY, ETC. -- REDEVELOPMENT AGENCY'S POWERS IN FORMULATING PLANS.

Gentlemen:

We are in receipt of your request for opinion as follows:

REQUEST

"At the meeting of the Finance Committee on Wednesday, September 7, 1955, on the subject of the Final Plan for Redevelopment of Diamond Heights, Mr. Neal Fellom made certain representations, which, according to Mr. Fellom, are in the nature of an alternative plan for a portion or portions of the Final Plan submitted and recommended by the Redevelopment Agency.

"By direction of the Finance Committee, Mr. Fellom's alternative plan is referred to you for your opinion and advice."

This reads as follows:

"ALTERNATE PLAN FOR PARTICIPATION BY OWNERS OF UNIMPROVED PROPERTY IN DIAMOND HEIGHTS.

"Inasmuch as the California State Redevelopment Act provides for the participation in the Redevelopment project by the owners thereof if the owners of such property agree to participate in the redevelopment in conformity with the redevelopment plan as follows:

> 'Every redevelopment plan shall provide for participation in the redevelopment of property in the project area by the owners of all or part of such property if the owners agree to participate in the redevelopment' (Sec. 33701)

"And furthermore since this right has been extended to all the owners of the improved property in the Diamond Heights Redevelopment project even though changes will be required in lot lines and grades - all such improved property owners are being allowed to participate merely on their expressed willingness to participate in accordance with the Plan.

"and since under present interpretations of the Act the Agency has virtually eliminated owners of unimproved property from participation making eligible for participation only 19 of over 2000 parcels.

"We ask that the same equal treatment be given to owners of unimproved properties who constitute by far the major ownership of the area and that such owners be allowed to participate under comparable conditions.

"We ask that the Section titled, 'The participation of present property owners' on page 36 on the final Redevelopment Plan be amended as follows: Strike out the present wording and insert:

> 'All owners of unimproved lots or property remaining after replatting which property still meets the minimum physical requirements of area, location, dimensions, use and frontage and who agree to participate in accordance with the plan shall be allowed to participate.'

"Also that the following Sections A and B on page 36 relating to a small exclusive list of unimproved properties eligible to participate be stricken out in its entirety or that the list be expanded to include all properties which meet the foregoing requirements.

"The Agency has assumed a working rule of eligibility which is not even spelled out by them in the Plan and certainly was never intended by the State Act.

"This working rule is that if any street work or grading work is required on unimproved property, such makes that property ineligible for participation. This, even though the remaining portions after street development work qualify in every respect as to physical dimensions, of area, size, width, location, use, and frontage. These are assumed powers not spelled out in the Plan nor set forth in the State Act, and which effectively prevents practically all of the unimproved property owners from participation.

"However, this convenient and novel interpretation which eliminates unimproved property owners from participation practically 100% is not applied by the Agency to owners of improved property. Improved property owners are allowed to

participate without exception notwithstanding required street development work, grading or lot line changes. All that is required is that they express a willingness to participate.

"We ask that these abused discretionary powers as to unimproved property participation be taken away from the Agency and returned to the property owners of unimproved property which meet the minimum physical requirements and who have expressed willingness to participate in conformance with the Plan as is their right under the State Act.

"Such is in conformance with the letter and spirit of the Redevelopment Act itself, the intent of which is to provide for development of undeveloped areas first by the owners if possible.

"Under the Equal Protection Clause of the 14th Amendment, owners of unimproved property should be placed upon the same basis as owners of improved property and treated equally in their right to participate. There is no reasonable basis for differentiation between these two types of property owners. The same factual situation applies as grading, street work, and lot line changes are contemplated in both cases. There is no reasonable basis to discriminate against owners of unimproved property in their right to participate.

"As to administrative problems for assessing costs for street development work, it is our understanding that such costs are being paid for by the Federal Government in the case of improved property owners. Therefore there is no Administrative problem in assessing costs. In any case there are time honored procedures for assessing street development work on a front footage basis that could be followed.

"A typical example of the misapplication of the intent of the State Act involves our lot 2 Block 6643. This is a large lot and the new plat provides for two contour streets to cross. Even so, with the new 33 ft. lots, this property as replatted still contains a number of complete lots fronting the new contour streets and which meet all physical requirements as to area, size, location and use. Yet the Agency says these lots are not eligible for participation and have excluded this lot from their eligible list of parcels allowed participation.

"Another example involves lot 17 block 6623 on Valley St. This lot conforms in every way to the Agency's definition of eligibility since Valley St. is to remain in its present location. Adjoining improved properties have been allowed participation. This lot is not considered eligible.

"Lots 13 and 14 in this same block (6623) on Valley St. offer 100 ft. frontage which after being cut by the new street still leaves more than enough to meet all physical qualifications. In fact the Agency says it will not further alter this lot remainder but will sell it as is. Since it qualifies as a lot why should we not be allowed to keep this remainder ourselves? This lot is also denied eligibility.

"We respectfully ask that the Board of Supervisors adopt this alternative plan which clearly spells out the right of unimproved property owners to participate in the plan on the same basis as owners of improved property.

Signed Neal Fellom
Neal Fellom
Attorney at Law

Roy Fellom, Jr. & L. H. Fellom
Roy Fellom, Jr., and L.H.Fellom
Property owners."

In addition to the points set forth in his letter, Mr. Fellom by telephone advised that he neglected to include in said letter a request that the Finance Committee consider Section 33732 of the Health and Safety Code, which provides:

> "If alternative plans are submitted the legislative body shall give preference to the plan which it deems will best redevelop the project area in conformity with the purposes and policy of this part and the master or general plan for the community and which requires the least interference with the continued enjoyment of existing property rights consistent with the purposes of this part."

OPINION

I have carefully reviewed the questions raised by Mr. Fellom.

It appears from such letter that Mr. Fellom is misinformed both as to the law and to the facts.

The Redevelopment Plan, as submitted, does not provide for participation by all the owners of improved properties in the area, nor does such Plan discriminate between the owners of improved and unimproved properties, as alleged. The Plan provides for the acquisition by the Agency of many parcels of improved properties, where such acquisition is necessary for street installation, grading, change of use, and other reasons deemed necessary for the proper effectuation of the overall redevelopment of Diamond Heights.

The Community Redevelopment Law contains specific provisions concerning the acquisition and retention of land on which there are existing buildings. (Sections 33013, infra, and 33275, H. & S. Code.)

The area does not contain over 2,000 parcels of land, as contended, but contains approximately 600 parcels.

The suggested language submitted by Mr. Fellom is impracticable and unworkable, and, if adopted, would prevent the efficient development of the Diamond Heights area. In order to properly install streets, grade, replat and re-parcel the area, it is necessary that the Agency acquire all parcels of land affected. In order to make the Plan economically feasible, the Agency must apportion to each parcel the costs of street installation, grading, installation of site improvements and supporting facilities, surveys, engineering, planning, and administration. Even when such costs are apportioned to the price of the land, the Agency will still suffer a loss, which loss will be assumed in part by the Federal Government, and by the grants-in-aid furnished by the City.

With reference to the particular lots referred to by Mr. Fellom, you are advised as follows:

Lot 2, Block 6643 - This parcel, referred to as a lot by Mr. Fellom, is in reality a block, with Mr. Fellom owning all of the parcel except six lots owned by others. The Agency must acquire all of the property involved in this block in order to accomplish much grading and filling because of the steepness of the land, and to install two new streets, with subsequent replatting. The cuts in the land will run as much as 32 feet with an average cut throughout the block of 20 feet. As a consequence it is impossible for Mr. Fellom to participate with the Agency in respect to this block.

Lot 17, Block 6623 - This lot is not considered eligible for participation by the Agency for several reasons. First, it will be necessary to grade the front of the lot. It will then be necessary to add a strip of land lying between Valley Street, which is to be realigned and the present frontage of the lot. Finally, the Agency has proposed a 33 feet width pattern and it is necessary to add approximately 17 feet of the Fellom lot to the westerly abutting land in order to maintain the pattern. This same process applies to the two narrow lots abutting the Fellom lot on the west.

Lots 13 and 14, Block 6623 - The installation of new streets across these two lots leaves an irregular pie-shaped parcel after approximately 75% of the two lot areas has been utilized for such streets. The pie-shaped parcel will require grading and it will be necessary to add to it a strip of land lying between the parcel and newly aligned Valley Street. It should be noted in this respect that Mr. Fellom's statement that the Agency will sell the balance of the parcel as is, is inaccurate. In the event that the Agency acquires the 25 feet of improved land lying east of the pie-shaped parcel, the improvements thereon will be demolished and all or a portion thereof may be added to the Fellom lots.

In order that the basic Plan may be properly accomplished, it is necessary that the Agency acquire title to each of said parcels.

Section 33013 of the Community Redevelopment Law (H. & S. Code) provides:

"'Redevelopment' means -

"(c) The replanning or redesign or original development of undeveloped areas as to which either of the following conditions exist:

"(1) The areas are stagnant or improperly utilized because of defective or inadequate street layout, faulty lot layout in relation to size, shape, accessibility, or usefulness, or for other causes."

Section 33042 provides:

"A blighted area is characterized by:

"(a) An economic dislocation, deterioration, or disuse, resulting from faulty planning.

"(b) The subdividing and sale of lots of irregular form and shape and inadequate size for proper usefulness and development.

"(c) The laying out of lots in disregard of the contours and other physical characteristics of the ground and surrounding conditions.

"(d) The existence of inadequate streets, open spaces, and utilities."

Section 33046 provides, in part:

"(c) Such conditions of blight are chiefly found in areas subdivided into small parcels, held in divided and widely scattered ownerships, frequently under defective titles, *and in many such instances the private assembly of the land in blighted areas for redevelopment is so difficult and costly that it is uneconomic and as a practical matter impossible for owners to undertake because of lack of the legal power and excessive costs*." (Emphasis added)

Section 33047 provides:

"(b) That whenever the redevelopment of blighted areas cannot be accomplished by private enterprise alone, without public participation and assistance in the acquisition of land, in planning and in the financing of land assembly, in the work of clearance, and in the making of improvements necessary therefor, it is in the public interest to employ the power of eminent domain, to advance or expend public funds for these purposes, and to provide a means by which blighted areas may be redeveloped or rehabilitated.

"(c) That the redevelopment of blighted areas and the provision for appropriate continuing land use and construction policies in them constitute public uses and purposes for which public money may be advanced or expended and private property acquired, and are

> governmental functions of state concern in the interests of health, safety, and welfare of the people of the State and of the communities in which the areas exist."

In the case of Redevelopment Agency of the City and County of San Francisco v. Hayes (involving the constitutionality of the California Community Redevelopment Law as applied to the Diamond Heights Project), 122 C.A. 2d 777 (cert. denied by U. S. Supreme Court in Van Hoff v. Redevelopment Agency 348 U.S. No. 2 897) the Court stated at page 807:

> "'The fact is, however, that the act contains as definite a description of what constitutes a blighted area as it is reasonably possible to express; in regard to such factors as the selection and the size of the areas to be redeveloped, the costs involved, and the exact form which the redevelopment in any particular case is to take, it was obviously impossible for the legislature to make detailed provisions or blueprints in advance for each operation ..... All that the legislature could do, therefore, was to prescribe general rules and reasonably definite standards, leaving to the local authorities the preparation of the plans and specifications best adapted to accomplish in each instance the desired result, a function which obviously can be performed only by administrative bodies. While the legislature cannot delegate the power to make a law, it may, where necessary, confer authority and discretion in connection with the execution of the law; it may establish primary standards and impose upon others the duty to carry out the declared legislative policy in accordance with the general provisions of the act.'" (Emphasis ours.)

In Berman v. Parker (decided by the U. S. Supreme Court December 1954), 348 U.S. No. 1, p. 26, the court stated at pages 34, 35 and 36:

> "In the present case, Congress and its authorized agencies attack the problem of the blighted parts of the community on an area rather than on a structure-by-structure basis."

> "Property may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending. But we have said enough to indicate that it is the need of the area as a whole which Congress and its agencies

> are evaluating. If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly. The argument pressed on us is, indeed, a plea to substitute the landowner's standard of the public need for the standard prescribed by Congress. But as we have already stated, community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis -- lot by lot, building by building.
>
> "It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch." (Emphasis ours.)
>
> "If the Agency considers it necessary in carrying out the redevelopment project to take full title to the real property involved, it may do so. It is not for the courts to determine whether it is necessary for successful consummation of the project that unsafe, unsightly, or insanitary buildings alone be taken or whether title to the land be included, any more than it is the function of the courts to sort and choose among the various parcels selected for condemnation." (Emphasis ours.)

See, also, my Opinion No. 991, issued September 16, 1955, concerning a somewhat similar subject matter.

It should be borne in mind that Mr. Fellom is guaranteed and will receive full compensation for his property.

In summary, it is my opinion that the Redevelopment Plan for the Diamond Heights Redevelopment Area and particularly that part of the Plan which affects the property owned by Mr. Fellom and owners of similar property, is not violative either of the Fifth or Fourteenth Amendment of the Constitution of the United States.

Respectfully submitted,

DION R. HOLM
City Attorney

MG/JEB

TO: FINANCE COMMITTEE
Board of Supervisors
235 City Hall
San Francisco 2

OPINION NO. 993

September 20, 1955

SUBJECT: LEGISLATION (SEC. 13205, EDUCATION CODE) RELATING TO POLITICAL ACTIVITIES OF SCHOOL EMPLOYEES, EFFECT ON CIVIL SERVICE EMPLOYEES

Dear Sir:

I am in receipt of your letter of August 19, 1955, wherein you request an opinion as to the effect that Assembly Bill No. 203 may have on Civil Service employees.

OPINION

Assembly Bill No. 203 entitled "An act to add Section 13205 to the Education Code, relating to political activities of school employees," as finally passed and approved on June 18, 1955, reads as follows:

> "An act to add Section 13205 to the Education Code, relating to political activities of school employees.
>
> "The people of the State of California do enact as follows:
>
> "Section 1. Section 13205 is added to the Education Code, to read:
>
> "13205.
>
> "Neither any local legislative body nor any school district governing board shall enact or enforce any ordinance or promulgate or enforce any rule or regulation which limits, during their off-duty hours, the participation of school employees in political activities not prohibited by this code." (Emphasis added)

It is significant to note that the aforementioned statute limits and prohibits action by either the local legislative body (Board of Supervisors) or the school district governing board (Board of Education).

Section 157 of the Charter of the City and County of San Francisco provides as follows:

> "Active participation in city and county politics, relative to the election or appointment of public officials, by civil service employees and eligibles of the city and county, is subversive of the best interests of the merit system and, therefore, persons holding positions in the classified civil service or on eligible lists for such positions shall take no active part in such political campaigns, or in soliciting votes, or in levying, contributing or soliciting funds or support, in each case for the purpose of favoring or hindering the appointment or election of candidates for city and county offices. Violation of the provisions of this section shall be deemed an act of insubordination and considered good cause for suspension or dismissal from position or removal from eligible list." (Emphasis added)

The above charter section adopted by the electorate is neither an act of the Board of Supervisors nor of the Board of Education and does not fall within the classification of acts prohibited by Section 13205 of the Education Code. Applying the rule of statutory construction, "Expressio unius est exclusio alterius," viz., "where the persons and things to which it refers are affirmatively designated there is an inference that all omissions were intended by the legislature" (Sutherland, Statutory Construction, Vol. 2, Sec. 4915), it is evident that the legislature did not intend to restrict or limit the charter powers of a municipality or a city and county in such matters.

It is, therefore, my opinion that insofar as Civil Service employees of the City and County of San Francisco are concerned, Section 13205 of the Education Code has no application or effect and that Charter Section 157 prohibiting active participation in the election or appointment of city and county officials still governs such activities.

Respectfully submitted,

DION R. HOLM
City Attorney

JC/LSM

TO: Hon. John J. Ferdon
Chairman, Judiciary Committee,
Board of Supervisors
235 City Hall, San Francisco 2

FILE NO. ________ RESOLUTION NO. ______

(Series of 1939)

AMENDING RESOLUTION NO. 9126 (SERIES OF 1939) TITLED "IN CONFORMITY WITH SECTION 4 OF THE PARKING LAW OF 1949 DECLARING THE NEED FOR A PARKING AUTHORITY TO BE KNOWN AS THE PARKING AUTHORITY OF THE CITY AND COUNTY OF SAN FRANCISCO TO FUNCTION IN SAID CITY AND COUNTY," IN RELATION TO THE SPECIFICATION OF PROJECTS OVER WHICH THE AUTHORITY SHALL HAVE JURISDICTION AND CONTROL.

RESOLVED, That Resolution No. 9126 (Series of 1939), the title of which is recited hereinabove, as amended by Resolution No. 9283 (Series of 1939), be further amended by adding thereto the following:

The Parking Authority of the City and County of San Francisco shall have jurisdiction and control over all future projects which shall be accomplished by said Authority with funds derived by it from sources specified in said Parking Law of 1949, unless otherwise provided by action of both the Board of Supervisors and the Authority.

FILE NO. 13660 (Series of 1939) RESOLUTION NO. ______

DECLARING AND FINDING A NEED FOR THE CITY AND COUNTY OF SAN FRANCISCO TO EXERCISE THE POWERS OF A PARKING AUTHORITY.

WHEREAS, this Board finds that there has been an ever-increasing number of motor vehicles using the streets of the metropolitan districts of San Francisco and as a result, traffic has become so congested that the free circulation of vehicles, including ambulances, fire apparatus, police and mass transit vehicles through such streets, necessary for the health, safety and general welfare of the public, has been seriously impeded; that the providing of parking facilities will reduce traffic congestion and thereby aid in the solution of this problem by removing motor vehicles from such streets, thereby promoting the public health, safety, convenience and welfare; and

WHEREAS, the supplying of additional parking facilities in the City and County of San Francisco, and the performance of all undertakings incidental or advantageous thereto are public uses and purposes for which public money may be spent and private prop-

FILE NO. 13660 (Series of 1939) RESOLUTION NO. ________

DECLARING AND FINDING A NEED FOR THE CITY AND COUNTY OF SAN FRANCISCO TO EXERCISE THE POWERS OF A PARKING AUTHORITY.

WHEREAS, this Board finds that there has been an ever-increasing number of motor vehicles using the streets of the metropolitan districts of San Francisco and as a result, traffic has become so congested that the free circulation of vehicles, including ambulances, fire apparatus, police and mass transit vehicles through such streets, necessary for the health, safety and general welfare of the public, has been seriously impeded; that the providing of parking facilities will reduce traffic congestion and thereby aid in the solution of this problem by removing motor vehicles from such streets, thereby promoting the public health, safety, convenience and welfare; and

WHEREAS, the supplying of additional parking facilities in the City and County of San Francisco, and the performance of all undertakings incidental or advantageous thereto are public uses and purposes for which public money may be spent and private property acquired, and are governmental functions; and

WHEREAS, in November of 1947 the electorate of the City and County of San Francisco authorized the issuance of $5,000,000 in general obligation bonds by approving the 1947 OFF-STREET PARKING BOND FUND proposition, which fund was authorized for the purpose of paying ". . . the cost of public parking lots, storage space, garages, single or multi-level structures, and other off-street parking facilities on, under or above the surface of any property, including public parks, squares, lands, easements or rights of way to be acquired by purchase or condemnation, together with buildings, structures, equipment, approach roads, entrances, exits, fencing, off-street parking meters, and other works, property or structures for the accommodation of automotive vehicles, and necessary or convenient for adequate parking facilities, to re-

lieve the congestion and to facilitate traffic in the metropolitan district of the City and County of San Francisco, provided that all lands and sites so acquired be subject to the approval of the Planning Commission of the City and County of San Francisco"; and

WHEREAS, on October 3, 1949, this Board, acting pursuant to the Parking Law of 1949 as then in force (presently codified, as amended, in the Streets and Highways Code, Sections 32500 - 33552), adopted Resolution No. 9126 (Series of 1939), declared a need for and constituted the Parking Authority of the City and County of San Francisco; and

WHEREAS, then and now, funds available for financing off-street parking projects have been and are City and County funds, subject to appropriation only by this Board, from the 1947 OFF-STREET PARKING BOND FUND; and

WHEREAS, the Charter of the City and County of San Francisco does not contain specific provisions relating to the power or exercising of the procedure to be followed in acquiring, constructing, completing or operating parking facilities; and

WHEREAS, the Legislature of the State of California has provided in the Parking Law of 1949 an adequate, proper and efficient means of exercising the power and for the procedure to be followed as an alternative to other existing laws and ordinances to achieve public parking, which law is available to the City and County of San Francisco; and

WHEREAS, the Charter of the City and County of San Francisco provides that ". . . The specification or enumeration in this charter of particular powers shall not be exclusive. The exercise of all rights and powers of the city and county when not prescribed in this charter shall be as provided by ordinance or resolution of the board of supervisors;" and

WHEREAS, this Board finds that the City and County of San Francisco should avail itself of the alternative method of pro-

cedure provided by the Parking Law of 1949,

NOW, THEREFORE, be it resolved by the Board of Supervisors of the City and County of San Francisco:

Section 1. This Board declares and finds a need for the City and County of San Francisco to exercise the powers of a parking authority and the City and County is herewith authorized to exercise any or all such powers and transact such business pursuant to said law.

Section 2. The City and County of San Francisco, in transacting business as and in exercising the powers of a parking authority shall have jurisdiction and control over the following pending projects: Ellis-O'Farrell, 5th and Mission, and Lakeside, respectively described and delineated in Resolutions Number 13170, 15538, and 13963, all Series of 1939, and such other projects which have been or shall be financed in whole or in part from funds of the City and County.

Section 3. All joint working agreements previously entered into by and between the City and County of San Francisco and the Parking Authority are hereby ratified and confirmed.

Section 4. The Parking Authority of San Francisco is requested to acknowledge City's action hereunder and concur in accordance herewith, by resolution.

OPINION NO. 994
September 21, 1955

SUBJECT: RESOLUTION DECLARING A NEED FOR THE CITY AND COUNTY TO EXERCISE THE POWERS OF A PARKING AUTHORITY (SUPERVISORS FILE NO. 13660) VALIDITY AND LEGAL IMPLICATIONS.

Gentlemen:

I am in receipt of your request for opinion dated September 7, 1955, as follows:

REQUEST

> "By direction of the Board of Supervisors at its meeting of September 6th, I am attaching copy of proposed resolution declaring a need for the City and County to exercise the powers of a parking authority.
>
> "It is requested that you review the measure and advise me as soon as possible as to its legality and also of the legal implications involved."

OPINION

The pertinent provisions of the Parking Law of 1949 codified in the Streets and Highway Code are as follows:

> "*SEC. 32650. Parking authority in each city.* There is in each city of the State a public body corporate and politic known as the parking authority of the city."
>
> "*SEC. 32651. Prerequisite to transaction of business or exercise of powers by authority.* The *authority* shall not transact any business or exercise any powers unless and until the legislative body of the city by resolution declares that there is need for the *authority* to function in the city." (Emphasis added.)
>
> "*SEC. 32654. Resolution declaring need for exercise of powers of parking authority as prerequisite.* A *city* shall not transact any business or exercise any powers pursuant to Section 33552 of this part unless and until the legislative body of the city declares by resolution that there is need for the *city* to exercise the powers of a parking authority." (Emphasis added)
>
> "*SEC. 33552. Exercise of powers of authority by city: Effect on other acts.* Any city may exercise

> any or all of the powers granted to an authority by this part alone, or in combination with powers granted by any other general law relative to parking facilities."
>
> "SEC. 32655. Adoption of resolutions: Division of jurisdiction and control. Either or both resolutions provided for in this chapter may be adopted by the legislative body. If both resolutions are adopted, they shall clearly specify the areas within the city within which, or the projects over which, the authority and the city, respectively, are to have jurisdiction and control. The division of jurisdiction and control shall be as specified, but may be changed from time to time to such extent as is consistent with obligations to bondholders, by action of both the legislative body and the authority."
>
> "SEC. 32502. Effect of statute on other provisions. This part shall not affect any other provision of law relating to the same or a similar subject but provides an alternative method of procedure governing the subject to which it relates; and it shall not abridge, modify or otherwise affect the right of any city to exercise any power given to it by the Constitution." (Emphasis added)

As stated in the proposed resolution, on October 3, 1949, the Board of Supervisors, acting pursuant to the Parking Law of 1949, adopted Resolution No. 9126 (Series of 1939) declaring a need for and constituting the Parking Authority of the City and County of San Francisco.

Under the provisions of Sections 33552 and 32654 the City may exercise any or all of the powers granted to an authority by adopting a resolution declaring that there is a need for the City to exercise the powers of a parking authority.

The Parking Law of 1949 recognizes the right of the City to exercise the powers of a parking authority even though a parking authority is also constituted and authorized to transact business and exercise the powers of an authority. Section 32655 permits the adoption of either or both resolutions, as provided in Sections 32651 and 32654, and further provides that if both resolutions are adopted they shall clearly specify the areas within which, or the projects over which, the Authority and the City, respectively, are to have jurisdiction and control.

The proposed resolution appears to be in proper form insofar as Section 1 thereof is concerned, wherein the Board declares and finds a need for the City and County of San Francisco to exercise the powers of a parking authority.

Section 2 of said proposed resolution specifies the projects over which the City is to have jurisdiction and control and in that respect seems to be in proper form. But Resolution No. 9126 (supra) does not specify the projects over which the Authority is to have jurisdiction and control. This was proper form at the time Resolution No. 9126 was adopted, but if the newly proposed resolution is to be adopted, Section 32655 of the Streets and Highways Code would require an amendment to said Resolution 9126 specifying the projects over which the Authority is to have jurisdiction and control. In this connection I have taken the liberty of drafting an amendment to Resolution 9126 which should be adopted concurrently with the proposed resolution in question. I have further taken the liberty of making a few suggested changes and amendments in the proposed resolution, a copy of which proposed resolution with such changes is also annexed hereto.

It is my opinion that the proposed resolution with the suggested amendments is in accordance with and authorized by the Parking Law of 1949. It would appear, however, that the adoption of said resolution will require some revision of Ordinance No. 9072 (Series of 1939) relating to the procedure for leasing of city-owned lands for public off-street parking facilities in order to avoid a possible conflict in procedures. In this regard I will be pleased to advise you at a later date.

In response to your inquiry as to the legal implications involved, it is my opinion that the adoption of this resolution will provide the City with an additional and alternative method of procedure, which at the present time is worthy of consideration. It should be noted that authority for regulation of rates, although deleted by the Legislature from the original draft of the Parking Law of 1949 except in relation to revenue bonds, has now been effectively included in this law as presently codified by an amendment of Section 32953, Streets and Highways Code, enacted by the State Legislature at its 1955 session. This amendment became effective September 7, 1955.

Section 32953, prior to amendment, read as follows:

> "The notice inviting bids shall distinctly and specifically describe the project and the facilities which are to be leased, the period of time for which the project is to be leased, and the minimum rental to be paid under the lease."

By amendment, the 1955 Legislature added this significant sentence:

> "The notice shall recite that there is reserved to the authority the power to fix and determine the rates to be charged by the bidder for the parking or storing of motor vehicles." (Emphasis added)

This amendment was introduced shortly after the decision in the case of City and County of San Francisco v. Ross, 44 A. C. 51, 279 P. 2d 529, requiring control of rates in leased operation of public parking facilities.

You have asked me to discuss the legal implications involved in the procedure in question. I must state that since the effective date of the above amendment one serious question raised by the Supreme Court decision above concerning the constitutionality of the Parking Law of 1949 has been eliminated and the City as well as the Parking Authority must retain the right to determine the rates to be charged. However, I must bring to your attention that since our Supreme Court has not as yet construed the Parking Law of 1949, there is nothing to prevent any interested person from instituting action at any time challenging the validity of this legislation. But, in view of the provisions of Section 1955 of the Government Code and of the foregoing considerations, it is my opinion that the Controller would be well within his legal rights to certify as to availability of funds for public off-street parking facilities insofar as the City would be acting pursuant to the provisions of the Parking Law of 1949.

I see no legal implications adverse to the interests of San Francisco in the legislation proposed as attached hereto.

You are advised accordingly.

Respectfully submitted,

DION R. HOLM
City Attorney

JC/JEB

TO: BOARD OF SUPERVISORS
235 City Hall
San Francisco 2

Attention: Mr. John R. McGrath
Clerk of the Board

Encls. (2)

OPINION NO. 995

September 21, 1955

SUBJECT: PUBLIC LIABILITY AND PROPERTY DAMAGE INSURANCE IN RE CONTRACTS FOR PUBLIC WORK; REQUIREMENTS AS TO SUBCONTRACTORS; INDEMNIFICATION PROVISION; AUTHORITY OF DIRECTOR OF PUBLIC WORKS IN RE AMOUNTS OF INSURANCE.

Dear Sir:

I have your request for opinion as follows:

REQUEST

"This Department is reviewing the subject of insurance protection for the City and County of San Francisco on construction contracts. We now require that each successful bidder (also known as the Contractor) furnishes satisfactory proof that he has taken out for the period covered by the contract, public liability and property damage insurance which will protect the Contractor, the City and County of San Francisco and its officers and employees from any damage claims for personal injury, including accidental death, as well as for property damage arising from operations under the contract.

"The minimum amounts of insurance required by us are as follows:

$50,000	for one person injured in one accident.
100,000	for more than one person injured in one accident.
5,000	for property damage in one accident.

"The question has arisen as to the necessity for requiring subcontractors to provide insurance protection similar to that required of the successful bidder or contractor. Since we have no contact with any such contractor, it is our belief that in the event of a damage claim it would be necessary for us to hold the contractor himself responsible even though a subcontractor was clearly at fault. We are further concerned in this matter because we are advised that an additional premium is charged for each insurance policy when the City and County of San Francisco is named as an additional insured. Such

additional premium is ultimately paid for by the City and County of San Francisco in the form of higher bid prices.

"We attach hereto our standard paragraph on public liability and property damage insurance which is included as part of the general conditions of all contracts. On the assumption that we will continue to require an insurance certificate from the contractor, we seek your opinion on the following:

1) Should the Department of Public Works require that all subcontractors furnish the Department with a certificate of insurance including public liability and property damage insurance in which the City and County of San Francisco and its officers and employees are named as additional insureds?

2) If the answer to Question No. 1 is 'No' - should the Department of Public Works require a statement from the contractor to the effect that all subcontractors have furnished certificates of insurance in which he (the contractor) is named as an additional insured?

3) In your opinion will the insurance requirements as set forth in the attached standard paragraph adequately protect the City and County of San Francisco?

4) Does the Director of Public Works have the authority to increase or decrease the amounts of insurance required?"

The standard provision for public liability and property damage insurance which you attach reads:

"PUBLIC LIABILITY AND PROPERTY DAMAGE INSURANCE

"The Contractor shall take out and maintain during the life of this contract such Public Liability and Property Damage Insurance as shall protect him and any subcontractor performing work covered by this contract, from claims for damages for personal injury including wrongful death, as well as from claims for property damages, which may arise because of the nature of the work or from operations under this contract, whether

such operations be by himself or by any subcontractor or anyone directly or indirectly employed by either of them even though such damages be not caused by the negligence of the Contractor, or any subcontractor, or anyone employed by either of them. The said Public Liability and Property Damage Insurance shall also directly protect the City and County of San Francisco, as well as the Contractor and his subcontractors, and all insurance policies issued hereunder shall so state. The amounts of such insurance shall be as follows:

> "Public Liability Insurance in an amount not less than $50,000 for injuries, including wrongful death to any one person, and, subject to the same limit for each person, in an amount not less than $100,000 on account of one accident, and Property Damage Insurance in an amount not less than $20,000 on account of a single accident and $40,000 in the aggregate,

provided, however, that the Director of Public Works may accept insurance covering a subcontractor in character and amounts less than the standard requirements set forth under this paragraph where such standard requirements appear excessive because of the character or extent of the work to be performed by such subcontractor.

"The following special hazards shall be covered by rider or riders to the policy or policies above required or by separate policies of insurance in amounts not less than the following:

> "Public Liability Insurance to cover automobiles trucks, etc., $10,000/$20,000.

"Before the execution of the contract, the successful Bidder shall file with the Department of Public Works a Certificate or Certificates of Insurance, covering all specified insurance. Each such Certificate shall bear an endorsement precluding the cancellation, or reduction in coverage, of any policy evidenced by such Certificate, before the expiration of five days after the Director shall have received notification by registered mail from the insurance carrier."

OPINION

1. Answer to Question 1.

No, provided the solvency of the contractor's insurer and surety is beyond question, and provided the policy furnished by the contractor covers any liability of the City for subcontractors' torts. See suggested modification of Sec. 2 (m) of the Standard Specifications set forth in appendix A hereto. A policy conforming to this provision would, in my opinion, insure the City against liability for a subcontractor's tort. During periods of economic stress it might be wise to require insurance from subcontractors as well as from the prime contractor.

2. Answer to Question 2.

No, provided there is no question of the solvency of the contractor's insurer and surety.

3. Answer to Question 3.

No. In my opinion Sec. 2 (m) of the Standard Specifications, in order adequately to protect the City and County of San Francisco, should be revised to read as set forth in appendix A hereto. The property damage liability limits should, of course, be increased on certain contracts, e.g., on a tunnel project.

Sec. 7 (b) of the Standard Specifications should, in my opinion, also be revised. See suggested modification thereof set forth in Appendix B hereto.

4. Answer to Question 4.

In contracts which he is authorized to let and the specifications and terms of which he is authorized to determine, the Director of Public Works has authority to increase or decrease the amounts of insurance required. There is no applicable statute or ordinance.

Respectfully submitted,

DION R. HOLM
City Attorney

GEB/VB

TO: Sherman P. Duckel, Director
Department of Public Works
260 City Hall
San Francisco 2, California

Appendix A and Appendix B
attached.

APPENDIX A

SUGGESTED MODIFICATION OF SEC. 2 (m) OF THE STANDARD SPECIFICATIONS.

(m) Public Liability and Property Damage Insurance. --

The Contractor shall procure and maintain during the life of the contract a policy or policies of public liability and property damage insurance issued by an insurer or insurers satisfactory to the Director of Public Works and in form approved by the City Attorney, insuring the Contractor and the City and County of San Francisco, its officers and employees in their capacities as such, against liability for damages for bodily injury, wrongful death, and property damage directly or indirectly resulting from the nature of the work, the performance of the contract, the ownership, maintenance or use of motor vehicles in connection therewith, or the acts, omissions, operations or conduct of the Contractor or any subcontractor under the contract or in any way arising out of the contract, irrespective of whether fault is the basis of the liability, and irrespective of whether any act, omission or conduct of the City and County of San Francisco, connected or unconnected with the contract, is a condition or cause, contributory or otherwise, of the accident, injury, death, or damage, and irrespective of whether the act, omission or conduct of the Contractor or subcontractor is merely a condition, rather than a cause, of the accident, injury, death or damage. Unless otherwise specified in the Special Provisions, the bodily injury liability limits shall be not less than $100,000 for injury to one person in one accident, including death resulting therefrom; and, subject to this limit as to each person, $300,000 for each accident. The property damage liability limits shall be not less than $20,000 for each accident, and $40,000 in the aggregate.

Each such policy shall contain a paragraph reading:

> "This policy is issued to comply, and it does comply, with the provisions of Section 2(m), 'Public Liability and Property Damage Insurance', of the Standard Specifications of the Bureau of Engineering, Department of Public Works, City and County of San Francisco, dated ____________________, 1955, any other provision hereof to the contrary notwithstanding. If any question shall hereafter arise concerning the risks intended to be insured against by this policy, it shall be determined by reference to the language of said Section 2(m)."

Each policy covering more than one insured shall contain the standard cross-liability provision.

APPENDIX A (Cont'd.)

The successful Bidder shall file before execution of the contract, and thereafter shall maintain, with the Department of Public Works the policy or policies of insurance herein required, or duplicate original or duplicate originals thereof. Each such policy shall provide that no cancellation or reduction in coverage shall become effective until at least ten days after receipt by the Director of Public Works of written notice thereof. If the life of the contract extends beyond the expiration date of any policy so filed, the renewal of such insurance shall be filed with the Department of Public Works at least ten days before such expiration.

APPENDIX B

SUGGESTED MODIFICATION OF SEC. 7 (b) OF THE STANDARD SPECIFICATIONS.

(b) Responsibility of Contractor -- Indemnification. --

The Contractor shall take and assume all responsibility for the work. As between him and the City, the Contractor shall bear all losses and damages directly or indirectly resulting to him, to the City, or to others on account of the character or performance of the work, unforeseen difficulties, accidents or any other causes whatsoever.

The Contractor shall assume the defense of and indemnify and save harmless the City and County of San Francisco, the Director of Public Works, and their officers and employees, from all claims, liability, loss, damage and injury of every kind, nature and description, directly or indirectly resulting from the nature of the work, the performance of the contract, the ownership, maintenance or use of motor vehicles in connection therewith, or the acts, omissions, operations or conduct of the Contractor or any subcontractor under the contract or in any way arising out of the contract, irrespective of whether fault is the basis of the liability or claim, and irrespective of whether any act, omission or conduct of the City and County of San Francisco, connected or unconnected with the contract, is a condition or cause, contributory or otherwise, of the claim, liability, loss, damage or injury, and irrespective of whether the act, omission, or conduct of the Contractor or subcontractor is merely a condition, rather than a cause, of the claim, liability, loss, damage or injury.

OPINION NO. 996

September 27, 1955

SUBJECT: HEALTH SERVICE SYSTEM, ELIGIBILITY FOR MEMBERSHIP OF CHILD CARE CENTER EMPLOYEES OF SCHOOL DEPARTMENT.

Gentlemen:

This office is in receipt of your request for an opinion as follows:

REQUEST

> "The Health Service Board has instructed the Secretary to ask for an opinion on the eligibility for Health Service membership of the Child Care Center employees of the School Department who have been admitted to City Civil Service by a new State law which became effective recently. We have been advised that these employees were formerly specifically excluded by State law from membership in local Retirement Systems and we are under the impression that they are actually State employees. We have your opinion that employees of the Municipal Court are not eligible for Health Service membership because they are State employees. Hence, this request."

OPINION

Section 172.1, Subdivision 1, of the Charter provides:

> "A health service system for municipal employees is hereby established. . . . The members of the system shall consist of all employees of the city and county who are members of the retirement system and all teachers and employees of the board of education who are members of said retirement system."

Education Code, Section 19611, has recently been amended to provide that:

> ". . . child care center employees of a unified school district coterminous with the boundaries of a city and county shall not be prevented from becoming members of a retirement system established for the employees of the city and county and of the unified school district."

It is my opinion that Child Care Center employees, who are members of the Retirement System, are eligible for membership in the Health Service System, and that such employees who are not now members of the Retirement System will become eligible for membership in the Health Service System upon becoming members of the Retirement System. I trust that the foregoing answers your inquiry.

Respectfully submitted,

DION R. HOLM
City Attorney

JJT/GEB

To: HEALTH SERVICE SYSTEM
61 Grove Street
San Francisco 2

Attention: Mrs. Zella B. Haynes
Secretary, Health Service Board

OPINION NO. 997
September 30, 1955

SUBJECT: SONORA UNION HIGH SCHOOL DISTRICT: LEGALITY OF
CONTRIBUTION BY CITY AND COUNTY OF SAN FRANCISCO

Gentlemen:

We have your request for an opinion as follows:

"By direction of the Finance Committee our file on the subject of request for financial assistance toward the education of children from the Moccasin Power House area is being referred to you.

"You will note from the file that Mr. James M. Reusswig, District Superintendent, Sonora Union High School, requested a contribution to the Sonora Union High SchoolDistrict in consideration of the services rendered children of employees of the City and County of San Francisco who reside at Moccasin Power House and attend Sonora Union High School.

"The matter was referred to the Public Utilities Commission and after investigation it was the recommendation of the Manager of Utilities that the request be denied.

"Mr. James Reusswig now writes, under date of June 13, 1955, stating that the Board of Trustees of said district have asked him to inform the Board of Supervisors of the City and County of San Francisco that transportation services will be withdrawn to students residing at Moccasin unless some financial aid is forthcoming, stating the costs are too great to ask the taxpayers to absorb.

"The Finance Committee requests an opinion from you on the following:

1. What obligation is there on the part of the City and County of San Francisco to contribute to the Sonora Union High School District as such?

2. Assuming there is no obligation, can the City and County of San Francisco contribute to the Sonora Union High School District?

3. Can the Sonora Union High School District, by reason of our failure to contribute to it, fail to provide the existing service?"

OPINION

The answer to your first inquiry is that there is no obligation on the part of the City and County of San Francisco to contribute to the Sonora Union High School District as such. The Sonora Union High School District is supported by local county real estate taxes and financial aid from the State of California. The Education Code of the State of California which contains the laws which impose these obligations for support by way of taxes and State aid makes no such obligation as proposed by the District Superintendent.

The answer to your second inquiry is that since there is no legal obligation the City cannot make a contribution to the Sonora Union High School District. In this connection please see paragraph 3 of Section 86 of the Charter of the City and County of San Francisco which reads as follows:

> "Every officer who shall approve, allow or pay any demand on the treasury not authorized by law, ordinance or this charter, shall be liable to the city and county individually and on his official bond for the amount of the demand so illegally approved, allowed or paid."

The answer to your third inquiry is that the Sonora Union High School District cannot fail to provide the existing service for the reason that the City and County of San Francisco fails to make the contribution as requested. Section 16251 of the Education Code of the State of California reads as follows:

> "POWERS OF GOVERNING BOARD; APPROVAL OF COUNTY SCHOOL SUPERINTENDENT. The governing board of any school district may provide, with the written approval of the county superintendent of schools, for the transportation of pupils to and from school whenever in the judgment of the board such transportation is advisable and good reasons exist therefor. The governing board may purchase or rent and provide for the upkeep, care, and operation of vehicles, or may contract and pay for the transportation of pupils to and from school by common carrier, or may contract with and pay responsible private parties for the transportation."

This section is clearly permissive in character. Girard vs. Monrovia City School District, 121 Cal. App. (2) at the bottom of page 743 (1953). Here, however, the Sonora Union High School District has undertaken to provide the transportation in question and are presently providing it. Having discretion as to whether or not they will provide transportation it becomes a question as to whether or not it is an abuse of that discretion to terminate the existing service as to a selected class of students.

It is my opinion that this transportation service as presently furnished cannot be terminated as to the students in question for the reason that the City and County of San Francisco fails to make a contribution as requested. This termination would clearly be an abuse of the discretion granted the governing board of the School District under Section 16251 (supra).

You are therefore advised accordingly.

Respectfully submitted,

DION R. HOLM
City Attorney

TAT JR/T. O'C

To: Board of Supervisors
235 City Hall
San Francisco 2
Attention: John R. McGrath, Clerk of the Board

OPINION NO. 998

October 5, 1955

SUBJECT: VALIDITY OF LEGISLATION PERMITTING CHIEF ADMINISTRATIVE OFFICER TO CONTINUE IN OFFICE BEYOND COMPULSORY RETIREMENT AGE; VALIDITY OF RELATED LEGISLATION FIXING AGE LIMIT.

Dear Sir:

I have received your following request for opinion:

REQUEST

"The Judiciary Committee has been directed to study the advisability of recommending legislation which will permit the present Chief Administrative Officer, Thomas A. Brooks, to continue in office beyond the compulsory retirement age.

"Will you please give me your opinion as to whether legislation of this nature can be enacted to continue the Chief Administrative Officer in his present position.

"Also, it would be of interest to know whether there can be an age limitation placed on the employment of any individual once there has been such a waiver through appropriate legislation of the Board of Supervisors."

OPINION

The foundational principles which control the first issue presented by you are as detailed in my Opinion No. 561, dated June 17, 1952. To convenience you in consolidating those principles with your present problem, I quote therefrom and reaffirm the following observations:

> "By virtue of the provisions of said Section 165, officers and employees (except members of the police and fire departments) become members of the retirement system if so provided by the Board of Supervisors. In this respect Section 165 provides in part as follows:
>
> > "'The system shall be applied to such offices, departments, bureaus, or classes of officers or employees of the city and county, including teachers in the San Francisco school department, as the supervisors shall determine. . . '
>
> "Section 165.2, effective July 1, 1947, sets up retirement

procedures and requirements for 'miscellaneous officers and employees' entering city service following said effective date, as well as for miscellaneous officers and employees who were members under Section 165 prior to July 1, 1947; excepting such officers or employees as might within times prescribed in Section 165.2 exercise a granted option to remain under Section 165.

"Under the definition of 'miscellaneous officers and employees' contained in paragraph (A) of Section 165.2, there is incorporated by reference the beforenoted power to the Board of Supervisors, given by Section 165, to determine what classes of officers and employees (except members of the police and fire departments) shall be members of the retirement system.

". . . . .

"The retirement provisions of the Charter, insofar as they relate to miscellaneous officers and employees, compel retirement from city and county service, upon reaching certain specified ages, only in instances where the concerned officer or employee is a 'member' of the retirement system upon reaching such specified age. (See Sections 165, 165.2)
. . . .

"Having the Charter-granted power to determine who of the city's officers and employees are to be included and continued as members of the retirement system, and thus subject to mandatory retirement, the Board of Supervisors has the power to make exclusions of certain classes, provided that the excluding action is not arbitrary and without reasonable basis for differentiating between such classes and other classes of officers and employees. (BROPHY v. RETIREMENT SYSTEM, 71 Cal. App. (2d) 455; MANSUR v. CITY OF SACRAMENTO, 39 Cal. App. (2d) 426; STATE, etc. v. McINTOSH, 60 N. E. (2d) 786 (Ohio))"

With respect to your present inquiry, it is clear that the Board would not have the power to point or "spot" an exclusion only for Mr. Brooks, and solely by reason of the Board's high regard for his abilities, aptitudes or accomplishments. Any such attempt would violate the legal requirement for reasonable and non-arbitrary action on a "class" basis (see Charter Section 165 and Opinion No. 561) and would contravene the state constitutional proscriptions against non-uniform laws (see Brophy v. Retirement System, 71 Cal. App. (2) 455) and denial of equal protection of the law (see Butterworth v. Boyd, 12 Cal. (2) 140). It has also been held, in a kindred situation,

that arbitrary classification does violence to the "privileges and immunities" clause of the state constitution. (See Mansur v. Sacramento, 39 Cal. App. (2) 426)

Hence, any such exclusionary action as might be taken must be grounded upon a justifiable and non-arbitrary distinction by which the office of Chief Administrative Officer can be segregated, for special status, from other offices and employments in the local governmental structure. You are reminded that any conclusion arrived at will be cloaked with a presumption of validity, in accordance with the rule of law stated in Brophy v. Retirement System, supra, wherein, at page 461, the Court said:

> "The presumption is that the legislative body acted properly, and unless the classification is clearly arbitrary, the legislation must be sustained. A court will not and should not set aside a statutory provision unless the classification is palpably arbitrary."

It would appear that the electorate has already set up a natural classification within the charter framework. Historically, government is diagrammed into three branches - the legislative, the executive and the judicial. While our local government does not contain a judicial branch, as such - although, at times, certain of its officers, boards and commissions may exercise "quasi-judicial" powers - the charter does set up the legislative branch (the Board of Supervisors) and the executive branch (the Mayor and departments under him). In addition, the people have set up a third large segment or branch of local government placed under the direction and control of the Chief Administrative Officer. While "executive" functions and "administrative" functions are theoretically in an identical governmental sphere (see Simpson v. Hite, 36 Cal. (2) 125; McKevitt v. Sacramento, 55 Cal. App. 117), the fact remains that within our charter the so-called administrative services are removed from the domain of the executive unit (Mayor) and power over them reposed in the Chief Administrative Officer.

Thus, in the pyramidal structure representing the government of this City and County, the occupants of the legislative, executive and administrative offices composing in the main our charter form of government, are the Board of Supervisors, the Mayor and the Chief Administrative Officer. Such is a separation and classification created by the electorate in their organic law, i.e., the charter. Moreover, it represents a class of "officers" so created by the electorate (Charter Section 4) as to have powers and duties different and wider in scope from those of other city and county officers.

Respecting membership in the retirement system, with its concomitant of compulsory severance upon reaching certain prescribed ages, the electorate has made it mandatory that the Mayor, as an elective officer, be and continue a member of the system (Charter Sections 158.1 and 158.2). On the other hand, and by virtue of said same charter sections, a member of the Board of Supervisors may not be a member of said system. However, by force of the beforenoted provisions of Charter Sections 165 and 165.2, it remains with the Board of Supervisors to determine whether the third entity in that charter-created classification of officers, the Chief Administrative Officer, may be excluded from the necessity for such membership on conditions prescribed in an appropriate ordinance. Whether such legislation should be enacted rests in the sound discretion of your Board.

Regarding your second question, it is my view that the Board's power of exclusion discussed above carries the right to fix such conditions as, in the exercise of its legislative discretion, it deems required to effectuate the best interests of the City and County. Concurrent with its power of exclusion from retirement system membership, the Board possesses all residual powers properly exercisable by the City and County (Charter Section 2). Such latter powers would, in my opinion, certainly include the power to fix another age limit for service in an instance where the Board has, by appropriate enactment, eliminated the otherwise applicable charter age for compulsory retirement. The Board's power to legislate in such respect could not be abdicated by what you have denominated a "waiver" of retirement system membership. (See Los Angeles v. Los Angeles, etc., Council, 94 Cal. App. (2) 36, at 47 - headnote 7)

You are advised as above set forth concerning the two questions proposed.

If it is your desire that the City Attorney draft the proposed legislation, it is my suggestion that at the same time all of the subject provisos in Section 221, subdivision (c), Part I of the Municipal Code be redrafted to provide for a maximum of continuity of services in the offices affected (attorneys, physicians, directors of art galleries and museums and chief administrative officer) and for smooth working of administrative detail.

Respectfully submitted,

DION R. HOLM
City Attorney

WFB/GEB

To: Mr. John J. Ferdon
Chairman, Judiciary Committee
Board of Supervisors
235 City Hall
San Francisco 2

OPINION NO. 999

October 6, 1955

SUBJECT: CHARTER SECTION 157, POLITICAL ACTIVITY OF CIVIL SERVICE EMPLOYEES, ENFORCEMENT, RELEVANCY OF EDUCATION CODE SECTION 13205.

Gentlemen:

I have your request for an opinion as follows:

REQUEST

> "I have been directed by Supervisor John J. Ferdon to communicate with and thank you in connection with your opinion No. 993, dated September 20, 1955, in connection with Section 13205 of the Education Code, relating to political activities of school employees.
>
> "Supervisor Ferdon is, of course, cognizant of the fact that Charter Section 157 is neither an enactment of the Board of Supervisors, nor of the Board of Education, but that it is an expression of the electorate.
>
> "Supervisor Ferdon desires to be informed additionally whether or not, in light of the newly enacted Section 13205 of the Education Code either the Board of Supervisors or the Board of Education can or should enforce, if necessary, the provisions of Charter Section 157."

OPINION

A careful study of the Charter shows that neither the Board of Supervisors nor the Board of Education is charged with the duty of enforcing the provisions of Charter Section 157. Such duty is vested in the appointing officer or in the Civil Service Commission by Section 154, which provides for the suspension and removal of Civil Service employees.

As pointed out in Opinion No.993, dated September 20, 1955, Section 13205 of the Education Code has no application or effect insofar as Civil Service employees of the City and County of San Francisco are concerned; therefore, Charter Section 157 prohibiting active participation in the election or appointment of city and county officials still governs such activities.

I again refer you to the language used in Section 157 of the Charter of the City and County of San Francisco, which reads as follows:

> "Active participation in city and county politics, relative to the election or appointment of public officials, by civil service employees and eligibles of the city and county, is subversive of the best interests of the merit system and, therefore, persons holding positions in the classified civil service or on eligible lists for such positions shall take no active part in such political campaigns, or in soliciting votes, or in levying, contributing or soliciting funds or support, in each case for the purpose of favoring or hindering the appointment or election of candidates for city and county offices. Violation of the provisions of this section shall be deemed an act of insubordination and considered good cause for suspension or dismissal from position or removal from eligible list." (Emphasis added)

It is my opinion that the use of the word "shall" where underlined allows for no exercise of discretion since a full reading of the section evidences a clear mandate by the electorate that the provisions thereof shall be enforced.

You are accordingly advised that neither the Board of Education nor the Board of Supervisors is charged with the duty of enforcing the provisions of Charter Section 157; that said duty rests with the appointing officer or the Civil Service Commission; that until repealed by the electorate the appointing officer or Civil Service Commission is duty bound to follow the mandate therein and enforce the provisions of Section 157 by appropriate action pursuant to the powers vested in them by Section 154.

Respectfully submitted,

DION R. HOLM
City Attorney

JC/LSM

To: Board of Supervisors
235 City Hall
San Francisco 2

Attention: Mr. John R. McGrath
Clerk of the Board

cc: Hon. John J. Ferdon
Chairman, Judiciary Committee

Opinion No. 1000
October 6, 1955

SUBJECT: HUNTINGTON SQUARE, LEGALITY OF USE OF SUBSURFACE AREA FOR PUBLIC PARKING FACILITY; SUPPLEMENTAL TO OPINION NO. 3883, DATED DECEMBER 2, 1946.

Gentlemen:

This will acknowledge receipt of your request that I review the opinion of my predecessor, Mr. John J. O'Toole, dated December 2, 1946, to the effect that the subsurface area of Huntington Square cannot be used for a garage.

You state that Supervisor Blake believes that the use of the subsurface area of Huntington Square for off-street parking would be consistent with, and in aid of, the gift of this land by Mrs. Huntington for park purposes only.

OPINION

I have carefully reviewed Mr. O'Toole's opinion No. 3883 of December 2, 1946, to which you refer, a copy of which is attached hereto, and find myself in full accord therewith.

The uses to which park property may be devoted depend largely upon the manner of its acquisition; that is, whether the property is dedicated by a private donor, or purchased or condemned by the municipality. A different construction is placed upon dedications made by individuals from those made by the public. The former are construed strictly according to the terms of the grant, while in the latter cases a less strict construction is adopted.

39 Am. Jur. §21, p. 817;

144 A.L.R. 486, 489;

City and County of San Francisco v. Linares,
(1940), 16 Cal. 2d 441, 444;

Ritzman v. City of Los Angeles (1940),
38 C.A. 2d 470, 474;

Slavich v. Hamilton (1927);
201 Cal. 299, 303.

The property here in question, and upon which Huntington Square is located, was conveyed to the City and County of San Francisco by a private party, namely, Arabella D. Huntington, subject to certain reservations and restrictions contained in the grant -- which grant must be strictly construed according to its terms.

City Attorney's Opinion No. 3883,
December 2, 1946.

In this connection it may be noted that Union Square was acquired not by grant of a private party, but as the result of a dedication by public authority. So, the rule of strict construction of the grant or use, as is here applicable, was not there applicable.

City and County of San Francisco v. Linares,
16 Cal. 2d 441, 444-446.

Likewise, the Civic Center Plaza land was not acquired by grant of a private party, but as the result of purchase and condemnation by the City and County of San Francisco. So, the rule of strict construction of the grant or use, as is here applicable, was not there applicable.

City Attorney's Opinion No. 920,
dated January 13, 1955, see pp. 3, 7.

Likewise, the property for St. Mary's Square was not acquired by grant of a private party, but as the result of purchase and condemnation by the City and County of San Francisco.

City Attorney's Opinion No. 933,
dated March 9, 1955.

Here, where the property in question was acquired by the City through a deed from a private donor and was conveyed for a certain definite public purpose, we must construe the dedication strictly in accordance with the terms of the grant.

Roberts v. City of Palos Verdes Estate (1949),
93 C.A. 2d 544;

Beth Israel Hospital Assn. v. Moses (1937),
(New York) 9 N.E. 2d 838.

The Huntington deed here in question contains the following reservations:

> "IT is the desire and intention of the grantor, by this deed of gift, to convey said real property to the City and County of San Francisco to be used and maintained as a public park, open and free to all the inhabitants of said City, under the name of the Collis P. Huntington Park. And the grantor reserves the right, at such time as she may elect, to erect in said park a suitable memorial statute or fountain.
>
> "THIS conveyance is made upon the express condition that the said real property shall be perpetually used and maintained as a public park as herein contemplated; and for no other purpose; and in the event that said property shall at any time cease to be so used and maintained as a public park, all the estate and interest of the grantee therein, or its successors shall cease and determine, and the title to said real property shall thereupon revert to and vest in the grantor, her heirs, executors, administrators or assigns."

It is to be noted that this conveyance was made upon the express condition that the real property in question shall be used as a public park and "for no other purpose", and then it further provides that the title shall revert to and vest in the grantor, her heirs, executors, administrators or assigns should there be any deviation from this grant.

The language of the deed provides for the use of the property for a public park and expressly excludes its use for ANY other purpose. Therefore, a strict construction of this grant, as we are required by law to make in this case, would exclude the use of this area for any subsurface garage, as an attempted divergent use of the property inconsistent with the express reservation made by Mrs. Huntington in her deed to the City.

You are therefore advised that I find myself in full accord with my predecessor's opinion of December 2, 1946 to the effect that the subsurface area of Huntington Square may not be used for the construction thereunder of any subsurface garage.

Respectfully submitted,

DION R. HOLM
City Attorney

NSW:RJR

To: Board of Supervisors
235 City Hall
San Francisco 2

Attention: John R. McGrath, Clerk

COPY

Opinion No. 3883
December 2, 1946

SUBJECT: LEASING OF THE SUB-SURFACE OF HUNTINGTON SQUARE FOR THE CONSTRUCTION AND OPERATION OF GARAGE.

Gentlemen:

This office is in receipt of your request for an opinion which reads as follows:

> "Enclosed herewith is a copy of the title report on Huntington Square, as prepared by the Title Insurance and Guaranty Company.
>
> "In view of the provisions contained in the deed, will you please submit to this office a written opinion as to whether or not the Commission may lease the sub-surface area of Huntington Square for the construction and operation of a garage."

OPINION

The property upon which Huntington Square is located was conveyed to the City and County of San Francisco by Arabella D. Huntington, and said conveyance contained the following reservations:

> "IT is the desire and intention of the grantor, by this deed of gift, to convey said real property to the City and County of San Francisco to be used and maintained as a public park, open and free to all the inhabitants of said City, under the name of the Collis P. Huntington Park. And the grantor reserves the right, at such time as she may elect, to erect in said park a suitable memorial statue or fountain.
>
> "THIS conveyance is made upon the express condition that the said real property shall be perpetually used and maintained as a public park as herein contemplated; and for no other purpose; and in the event that said property shall at any time cease to be so used and maintained as a public park, all the estate and interest of the grantee therein, or its successors shall cease and determine, and the title to said real property shall thereupon revert to and vest in the grantor, her heirs, executors, administrators or assigns."

The case of City and County of San Francisco v. Linares, 16 Cal. 2d. 441, would appear at first blush to be directly in point.

It will be recalled that previous to the granting of a fifty year lease for the sub-surface space beneath Union Square, the validity of the lease was determined in the aforementioned case. The City and County of San Francisco, however, acquired title to the property covered by Union Square from its predecessors, the Town of San Francisco, who, in turn, acquired title prior to the admission of California into the Union. There was a provision in the deed from the Town Council to the Town of San Francisco to the effect that the property was to be laid out as a public square. Section 41 of the Charter provides that the Board of Park Commissioners shall have complete and exclusive control, management, and direction of parks and squares. However, the Commission is given authority to lease sub-surface areas, under certain conditions, for a period not to exceed fifty years.

It will be noted at the outset that Union Square was acquired through a public grant, whereas, Huntington Park was acquired through a private deed. The Supreme Court in the Union Square case uses the following language on Page 444:

> "It will also be noted that the Town of San Francisco acquired the property, not as the grantee of a private party or individual, but as the result of a dedication by a public authority. The rule of construction is not the same in both instances. In Slavich v. Hamilton, 201 Cal. 299 (257 Pac. 60), wherein the question of the right to construct a veterans' memorial hall in a public park was involved, it was said: 'The uses to which park property may be devoted depend, to some extent, upon the manner of its acquisition, that is, whether dedicated by the donor, or purchased or condemned by the municipality. A different construction is placed upon dedications made by individuals from those made by the public. The former are construed strictly according to the terms of the grant, while in the latter cases a less strict construction is adopted. (Harter v. San Jose, 141 Cal. 659 (75 Pac. 344); Spires v. City of Los Angeles, 150 Cal. 64 (87 Pac. 1026, 11 Ann. Cas. 465).)'"

On Page 446, the Court also said:

> "'Where a tract of land is donated to a city with a restriction upon its use, -- as, for instance, when it is donated or dedicated solely for a park -- the city cannot legally divert the use of such property to purposes inconsistent with the terms of the grant. A less strict con-construction is adopted as to dedications made by the public. (Slavich v. Hamilton, 201 Cal. 299, 303 (257 Pac.60).) The case here is not one of the type first referred to, in which a donor transfers property to a municipality for a fixed and definite purpose defined in the grant, and where the rule of strict construction is to be applied.' With

> the foregoing rules in mind, it must be concluded that the City and County of San Francisco holds Union Square by virtue of a dedication by the public and that there is nothing in the terms of the original grant which would deprive the city and county of the right to change the character of the use of the land so long as the contemplated use is not inconsistent with enjoyment by the public of the land for park purposes."

On Page 447, the Court in reviewing the case of Harter v.San Jose, 141 Cal. 659, pointed out that the Court in the Harter case called attention to the fact that the dedication was, as in the Union Square case, not by private parties, but by the public. There is a distinction drawn in all the cases between grants by a private donor for park purposes and property acquired by public authority through condemnation or purchase. See

> Spinks v. Los Angeles, 220 Cal. 366, and
> Ritzman v. Los Angeles, 38 Cal. App. 470.

In each of the last cited cases the Court points out that where land is donated to a city with a restriction upon its use -- as when it is donated or dedicated solely for a park -- the city cannot legally divert the use of such property to a purpose inconsistent with said grant. That a different rule applies where the city has acquired title and fee was also pointed out in Slavich v. Hamilton, 201 Cal. 299. To the same effect

> Beth Israel Hospital Association v. Moses, 275 NY 209, 9 Northeastern 2nd. 838;
> Fort Worth v. Barnett, 115 Southwest 2nd. 436;
> Olmstead v. San Diego, 134 Cal. App. 14.

With respect to leasing of property, the Court in the case of Reynolds v. Alice, 150 Southwest 2nd 455, said:

> "This use was commercial in character and not necessary or appropriate to the use of the property as a street or park. This, we take to be a use unauthorized by the easement conferred by the dedication of the property. It was a deviation from or misuse of the easement arising from the dedication of the property."

With the foregoing principle outlined by the Court as our guide, we may now turn to the instruction in the deed of Mrs. Huntington. It will be noted that she provided that the conveyance was made upon express condition that the real property could be used as a public park and for no other purpose, and further provided that the title should revert to her heirs, executors, administrators, or assigns, should there be a deviation from her grant.

It is not believed that the use of the sub-surface area of Huntington Park for a garage can be construed as a use for a public park. It is believed that this would be inconsistent with the reservations made by Mrs. Huntington in her deed to the City and County of San Francisco. You are therefore advised that it is my opinion that the Board of Park Commissioners may not lease the sub-surface area of Huntington Square for the construction and operation of a garage.

Respectfully submitted,

JNO. J. O'TOOLE

City Attorney.

To: Park Commissioners

RJB

OPINION NO. 1001

October 10, 1955

SUBJECT: VETERANS'DAY CELEBRATION, LEGALITY OF APPROPRIATION FOR CASH PRIZES OR TROPHIES

Dear Sir:

This office is in receipt of your following request for opinion:

REQUEST

"The Finance Committee of the Board of Supervisors, on September 28, 1955, requested I secure an opinion from you as to whether proposed expenditures for a Veterans' Day Celebration on November 11th next, are legal and proper.

"$10,000 has been requested. Of this sum, it is contemplated cash prizes or trophies will be given to units and in amounts as follows:

For military marching units	$ 500.
Veterans' units only	2,500.
Fraternal organizations	2,500.
R.O.T.C. school units	500.
Youth Groups	500.

"For your further information, other expenditures contemplated include: $1,500 for Market Street decorations, $1,000 for publicity and promotion, and $500 for contingencies.

"Please advise as to whether the appropriations for cash prizes or trophies are legal and proper. If you believe the other items should be discussed, your opinion in these regards would be appreciated."

OPINION

The general rule for the expenditure of municipal funds has been stated as follows:

> "Any power conferred on a municipality must be exercised for a public use or purpose as distinguished from a private purpose, . . ." (McQuillin, Municipal Corporations, 3rd Edition, Volume 2, Sec. 10.31)

It is settled beyond question that promotion of patriotism involving as it does the sense of self-preservation is the most ele-

mental of public purposes.

> "The erection of a building as a memorial hall, to the extent that it would serve as a stimulus to patriotism, would be for a public purpose."
>
> "Veterans of every war are, as a whole, a reasonable classification, within the purview of the constitution, for legislation which has in view the conferring of benefits upon them."
>
> Allied Architects' Assn. v. Payne, 192 Cal. 431.

Section 2 of the Charter of the City and County of San Francisco provides further powers to the City and County, among which is the following:

> "The city and county may make and enforce all laws, ordinances and regulations necessary, convenient or incidental to the exercise of all rights and powers in respect to its affairs, officers and employees, and shall have all rights and powers appropriate to a county, a city, and a city and county, subject only to the restrictions and limitations provided in this charter, including the power to acquire and construct plants, works, utilities, areas, highways and institutions outside the boundaries of the city and county, and maintenance and operation of the same, and the exercise of functions or maintenance of services outside the boundaries of the city and county, including the expenditure of funds therefor through any agency. The specification or enumeration in this charter of particular powers shall not be exclusive . . ."

What is for the public good and what are public purposes are questions which the Legislature must decide upon its own judgment in respect to which it is vested with a large discretion which cannot be controlled by the courts except where its action is clearly evasive. (Daggett v. Colgan, State Controller, 92 Cal 53) What is true of the State of California in this regard applies with equal force to the City and County of San Francisco.

In determining whether the appropriation for cash or trophies is to be considered a gift the primary question is whether the funds are to be used for the public or as a private purpose and if they are for a public purpose they are not a gift. (County of Alameda v. Janssen, 16 Cal 2d 276) The appropriation for cash

prizes or trophies for the purpose of stimulating patriotism and symbolic of the veterans' spirit of sacrifice conceived and consummated in recognition of their deeds of heroic daring and perpetuated in grateful remembrance to those who dedicated their lives to the service of their country is a public purpose. The continuity of our governmental institutions is dependent in a large measure upon the perpetuation of a patriotic impulse which is the willingness to sacrifice all for the ideas and ideals which form the foundation of our republic. (See Allied Architects' Assn. v. Payne, 192 Cal 431)

The fact that private persons or organizations may benefit indirectly due to expenditures of public funds does not indicate a gift where the funds are expended for a public purpose which is primarily for legislative discretion. (California Employment Stabilization Commission v. William E. Payne, 31 Cal 2d 210)

The conclusions drawn herein are made solely upon the basis of the particular issues presented, and you are advised that such conclusions do not necessarily constitute precedent for expenditure of City funds for other and future celebrations or parades. In short, each such related situation must be scanned and decided upon its own merits and factual circumstances.

Respectfully submitted,

DION R. HOLM
City Attorney

TO: Mr. Harry D. Ross
Controller
City and County of San Francisco
109 City Hall
San Francisco 2

PRK/WFB

OPINION NO. 1002

October 11, 1955

SUBJECT: TIME OFF TO VOTE AT GENERAL AND SPECIAL MUNICIPAL ELECTIONS

Dear Sir:

This office is in receipt of request for an opinion as follows:

REQUEST

> "While we understand that employees are entitled to time off for voting at any general direct primary or presidential election, we desire a memorandum opinion as to whether the Municipal Railway is required to provide time off for voting at the election to be held November 8, 1955."

OPINION

Section 5699 of the Elections Code which provides for time off to vote reads as follows:

> "Leave of absence from employment to vote without loss of pay for absence. If a registered voter does not have sufficient time outside of his working hours within which to vote at any general, direct primary or presidential primary election, he may, without loss of pay, take off so much working time as will, when added to his voting time outside his working hours, enable him to vote.
>
> "If an employee has four consecutive hours in which to vote, either between the opening of the polls and the beginning of his regular working shift, or between the end of his regular working shift and the closing of the polls, he shall be deemed to have sufficient time outside of his working hours within which to vote. If he has less than said four consecutive hours, he may take off so much time as will enable him to vote, but not more than two hours of which shall be without loss of pay; provided, that he shall be allowed time off for voting only at the beginning or end of his regular working shift, whichever allows him the most free time for voting and the least time off from his regular working shift, unless otherwise mutually agreed.

> "If the employee on the third working day prior to the day of the election, knows or has reason to believe, that he will need time off to enable him to vote on election day, he shall give his employer at least two working days' notice that he desires time off in accordance with the provisions of this section."

Section 5699.1 which also deals with the subject matter of the method of handling time off to vote reads as follows:

> "Notice of provisions of §5699: Duty to post. Not less than 10 days before every general, direct primary or presidential primary election, every employer shall keep posted conspicuously at the place of work, if practicable, or elsewise where it can be seen as employees come or go to their place of work, a notice setting forth the provisions of Section 5699 of this code."

The Salary Standardization Ordinance in Section VI, Subdivision c, of its administrative provisions incorporates the above language of Elections Code 5699 therein. Section 5699.1 is not included in the ordinance section inasmuch as it applies only to the employers' responsibility.

Under both the State law and the Salary Standardization Ordinance the question of time off to vote, therefore, is handled identically. For the sake of brevity, we will comment only on the provisions of the Elections Code quoted above with the understanding that the same comments will apply equally to the provision of the Salary Standardization Ordinance referred to above.

Section 5699 refers to "any general, direct primary or presidential primary election." An examination of the Elections Code shows that each of these elections are defined as follows:

> "§23. 'General election.' 'General election' is the election held throughout the State on the first Tuesday after the first Monday of November in each even numbered year.
>
> * * * * *
>
> "§25. 'Presidential primary.' 'Presidential primary' is the primary election, held on the first Tuesday in June of each year of the general election at which electors of President and Vice President of the United States are to be chosen.
>
> "§26. 'Direct primary.' 'Direct primary' is the primary election held on the first Tuesday after the first Monday in June in each even-numbered year to nominate

> candidates to be voted for at the ensuing general election or to elect members of a party central committee."

Furthermore, the Elections Code in Section 28 defines a local election as follows:

> "§28. 'Local election.' 'Local election' is a municipal, county, township, or district election."

From this analysis it is evident that provisions of the Elections Code and the Salary Standardization Ordinance concerning time off to vote apply only to three specific types of elections mentioned therein, to wit: a general, presidential primary and direct primary election. The election to be held on November 8, 1955 is a combined general municipal election and a special municipal election which is called pursuant to Sections 5 and 174 of the Charter and falls within the definition contained in the Elections Code covering local elections (see Section 28, supra, Elections Code).

While it is true that at the election on November 8, 1955 certain judicial officers, to wit: municipal judges, will be chosen, this is done pursuant to State law (Government Code 71142) which provides that they shall be elected in the manner prescribed in the Charter of the City and County of San Francisco (see Section 5, Charter, City and County of San Francisco).

I advise you, therefore, that under the State law and the local ordinance (Salary Standardization Ordinance) the Municipal Railway is not required to provide time off for voting at the general and special municipal election to be held on November 8, 1955.

While this opinion is a direct response to a request made by the Acting General Manager of the Municipal Railway, I wish to call its attention to all department heads and point out that it applies to them as well.

Respectfully submitted,

DION R. HOLM
City Attorney

BJW/TMO'C

To: G. W. Evington
Acting General Manager
Municipal Railway
City and County of San Francisco
949 Presidio Avenue
San Francisco 15, California

OPINION NO. 1003

October 25, 1955

SUBJECT: HEALTH SERVICE BOARD, AUTHORITY TO PAY CLAIMS NOT IN ACCORD WITH ANY ADOPTED PLAN.

Dear Sir:

I have your request dated October 18th for opinion as follows:

REQUEST

"The Health Service Board under date of September 21, 1955, took the following action with regard to the following listed cases by a vote of seven members of its total membership of nine:

				Vote	
Case No.	Warrant No.	Amount	Explanation *-In excess of	Ayes	Noes
W-6788	2818	$ 173.75	12-Month limitation	4	3
W-18441	2819	465.00	12-Month limitation	4	3
IC-14732	2821	93.75	12-Month limitation	5	2
W-18441	2823	31.00	12-Month limitation	4	3

"We have examined the various plans adopted by the Health Service Board and cannot find a provision in any of these plans which authorizes the aforementioned proposed payments.

"Copies of our correspondence with the Health Service Board in this regard are attached hereto.

"For your information, quoted herewith is Section 24 of Plan I and an excerpt from the Rate and Benefit portion of Plan I:

"*-'SECTION 24 - LIMITATION OF SERVICES - DEPENDENTS AND INDEPENDENT BENEFICIARIES.

'Services to be given dependents and independent beneficiaries other than Retired Employees shall be limited to one year for any one condition, illness or injury from date of the original diagnosis of said condition. Service rendered since the beginning of the System shall be included in computing the limitations. Retired employee members who continue

> as subscribers to the System shall have the same rights to service as members.'
>
> 'Independent beneficiaries (except retired employees) and all dependents, one year's service for any one condition, illness or injury.'

"May we have your opinion on the following:

"Has the Health Service Board the power to authorize payments of the aforementioned character that are not provided for in any plan adopted pursuant to the provision of Subdivision 3 of Section 172.1 of the Charter?"

In supplementary requests you state:

"This is supplementing our letter to you of October 18, 1955 concerning the legality of paying certain bills which have been approved by the Health Service Board.

"The following payments are being held for reason as noted:

Note No.	Case No.	Warrant No.	Amount	Not in accord with Plan I	Vote	
					Ayes	Noes
1	R 7504	1456	780.00	Sec. 28	6	1
2	IC14732	1457	165.44	Sec. 24	6	1
3	(IC 28913 (2C 28913	1458	161.00	Sec. 26	6	1
4	3C 16504	1449	30.00	Sec. 26	6	1
5	W 8903	1452	225.16	Sec. 24	7	0
6	W 10628	1454	133.50	Sec. 31	4	3

(See: Health Service Board minutes of meetings for May 26, 1955 and June 23, 1955.)

"Please discuss the problems indicated by this letter in your reply to my inquiry of October 18, 1955."

"Supplementing my letter of October 19, 1955, in addition to Warrant No. 1449, there was inadvertently omitted the following:

Note No. 4, Case No. 3C16504,

Warrant No. 1450, Amount $150.00.

"Please consider this case in your opinion."

OPINION

In my opinion the answer to your question is No.

The Health Service Board is bound by the terms of Plan 1 and has no power to authorize payments for which the plan does not provide.

Before taking effect, the plan was adopted by a two-thirds vote of the entire nine-man Board. (Charter §172.1, subd. 3) The adequacy of medical care provided by the plan is reviewed and determined annually by the Board at public hearings. (Charter §172.1, subd. 3, (a), 4.)

These annual determinations are reviewable by the Retirement Board which is empowered to disapprove them and refer them to the Health Service Board for further consideration. (Charter §172.1, subd. 3, (a), 4)

Neither four members of the Board, nor any other number, have authority to abrogate the provisions of the plan.

The plan has to be financed by the members of the System. (Charter §172.1, subds. 4, 6) When adopted, it becomes a contract with them, and the moneys paid into the System by them are public moneys administered by the Board as a public trust. For the Board to cause those moneys to be paid out other than in compliance with the terms of the plan, is a violation of the contract and a breach of trust.

The Health Service Board has wide discretion in formulating a medical plan, but once formulated and adopted, the Board is bound by its terms. The procedure for the Board to follow, if not satisfied with its plan, is to revise it. (Charter §172.1, subd. 3, (a) 4)

You are advised accordingly.

Respectfully submitted,

DION R. HOLM
City Attorney

GEB/WFB

TO: Harry D. Ross, Controller

Opinion No. 1004
October 27, 1955

SUBJECT: RECREATION AND PARK DEPARTMENT, CONCESSION AGREEMENT FOR OPERATION OF PONY RIDES, WITHOUT APPROVAL OF SUPERVISORS, LEGALITY.

Dear Sir:

I have before me your request for opinion as follows:

REQUEST

> "Transmitted herewith is a communication dated August 24, 1955, directed to the Recreation and Park Commission from Mr. H. Ward Dawson, Jr., Counsel for the Civil Service Association of San Francisco, in which certain legal questions are posed with respect to the pony rides concessions at Fleishhacker Playfield and at Children's Playground in Golden Gate Park.
>
> "I have been directed by the Commission to request from you an opinion as to the points brought up by Mr. Dawson. Since the operation of the pony rides concession is a matter of urgent importance to this Commission, your earliest possible attention to this request will be deeply appreciated. In this connection Mr. R. H. Hoyt, Business Manager, who has immediate jurisdiction over the pony rides concession, will be happy to provide any information you may desire."

OPINION

The main question posed by Attorney Dawson's letter revolves around an interpretation of the following pertinent words of Section 42 of the City Charter.

> "The Commission shall not lease any part of the lands under its control nor permit the building or maintenance or use of any structure on any park, square, avenue or ground, except for recreation purposes, and each letting or permit shall be subject to approval of the board of supervisors by ordinance, . . ."

Examination of the proposed concession agreement or permit discloses that it seeks to grant to the private concessionaire a limited right to use twenty-two (22) city-owned ponies "stabled at the Fleishhacker Playfield and Children's Playground" in operating the pony rides upon such locations in and about said areas "as may be prescribed by the General Manager". Clearly then the concessionaire in addition to being allowed the use of city-owned ponies is also being permitted the use of city-owned stables, which are structures, and certain portions of the grounds in a way that brings the concession or

permit within the scope of the above-quoted portion of the City Charter requiring the approval of the Board of Supervisors.

Assuming that power exists in the Commission to make such a concession agreement inasmuch as it does not contravene any primary use of the Park (Kurtz v. Clausen, et al., 77 N.Y.S. 97, 98), nor involve the City in payments of compensation within the meaning of Sec. 142 of the Charter, the words "subject to the approval of the Board of Supervisors" become the key words for interpretation. Do they make such approval a condition precedent to any action being taken by the Commission, or do they permit operation under a temporary agreement pending approval by the Board? I take the view in this instance that it does permit temporary action by the Commission, if taken in good faith, pending such approval (Johnson v. Landucci, 21 C. 2d 63, 68-69; People ex rel Todd v. Board of Education, 258 Ill. App.271), but nevertheless at the Commission's risk if approval of the agreement is not retroactively received from the Board.

This office has been advised by Mr. Hoyt that the basis on which the Commission is now temporarily operating the pony rides through the private concessionaire, pending negotiation of an approved agreement by the Board, is a good faith attempt on its part to continue the pony rides as a recreational enjoyment for children despite a budgetary deletion of hostler employment for the operation from the Commission's budget this year. This deletion, he states, was made over the protests of the Commission and with no collusion on its part to bring it about. Consequently, faced with such an elimination of necessary employment, the Commission took what it considered the only available recourse for continuing the pony rides by handling them through a private concessionaire and sincerely believing that the approval of the Board of Supervisors would be forthcoming. While the proposed agreement as submitted has not as yet been approved by the Board, I am advised that it is pending as a tabled matter before the Finance Committee awaiting revision as to some of its terms. Thus, unqualified rejection of such an agreement has not yet occurred either in the Finance Committee or the Board.

Predicating my opinion upon such a factual situation, including the assumption of good faith on the part of all parties involved, I deem the said temporary operation being indulged in by the Commission as legally permissible under Section 42 of the Charter only if the same is ratified by the Board of Supervisors. If such ratification is not obtained, the matter of personal liability on the part of the Commissioners, if any, becomes essentially a matter for the Commissioners to overcome through proof of good faith in operating under an unapproved and unratified agreement. (McQuillin, Municipal Corporations, 3d Vol., Sec. 12.214; Modesto Investment Co. v. Modesto City School District, 213 C. 410.)

You are advised accordingly.

Several other questions are impliedly raised in Attorney Dawson's letter, but it appears to me that any resolution of them should await the further action of the Commission and the Board of Supervisors in this matter.

Respectfully submitted,

DION R. HOLM,
City Attorney

RJR/BJW

TO: WILLIAM SIMONS, Acting Secretary,
Recreation and Park Commission
McLaren Lodge, Golden Gate Park
San Francisco 17.

WALKER PEDDICORD
CHIEF DEPUTY CITY ATTORNEY

EDMOND P. BERGEROT
CHIEF TRIAL DEPUTY

DEPUTY CITY ATTORNEYS
NORMAN SANFORD WOLFF
LAWRENCE S. MANA
JOSEPH F. MURPHY
C. WESLEY DAVIS
VIRL BENNEHOFF
EDWARD I. FITZPATRICK
BERNARD J. WARD
GEORGE E. BAGLIN
THOMAS J. BLANCHARD
WILLIAM F. BOURNE
DONALD J. KROPP
JOHN ELMER BARRICKLO
THOMAS A. TOOMEY, JR.
JEROME COHEN

DION R. HOLM
CITY ATTORNEY
CITY HALL
SAN FRANCISCO 2, CALIFORNIA
HEmlock 1-1322

THOMAS M. O'CONNOR
PUBLIC UTILITIES COUNSEL

DEPUTY CITY ATTORNEYS
AGNES O'BRIEN SMITH
FRANK J. NEEDLES
MORLEY GOLDBERG
RICHARD SAVERI
GEORGE P. AGNOST
WILLIAM E. MULLINS
ROBERT M. DESKY
SAMUEL E. YEE
RAYMOND J. REYNOLDS
PATRICK R. KELLY
EMMET B. KEEFFE
JOHN J. TAHENY, JR.
THEODORE J. LITTLE
McMORRIS M. DOW

PAUL L. BECK
CHIEF VALUATION AND RATE ENGINEER

October 27, 1955

Mr. William H. H. Davis
Foreman, Grand Jury
984 Folsom Street
San Francisco 7, California

Dear Mr. Davis:

In accordance with our conversation and a review of the Grand Jury report concerning the Assessor's office, I am writing to you and the Grand Jury relative to my opinion as to the legality of a charter amendment which would put into effect the recommended changes in the operation of the Assessor's office contained in your report. These changes could, in my opinion, be accomplished by a charter amendment.

The Constitution of the State of California, Article XI, Section 5, reads in part as follows:

> "The Legislature, by general and uniform laws, shall provide for the election or appointment, in the several counties, of boards of supervisors, sheriffs, county clerks, district attorneys, and such other county, township, and municipal officers as public convenience may require, and shall prescribe their duties and fix their terms of office. It shall regulate the compensation of boards of supervisors, district attorneys and of auditors in the respective counties and for this purpose may classify the counties by population. It may regulate the compensation of grand and trial jurors in all courts within the classes of counties herein permitted to be made. The boards of supervisors in the respective counties shall regulate the compensation of all officers in said counties other than boards of supervisors, district attorneys, auditors, and judges of municipal courts, and shall regulate the number, method of appointment, terms of office or employment, and compensation of all deputies, assistants, and employees of the counties.

> "The provisions of this section shall not be construed to abridge, modify or otherwise affect the provisions of Sections 7-1/2, 7-1/2a and 8-1/2 of this article, relating to county or city and county charters. That certain act entitled 'An act to add a new section to the Political Code to be numbered 4056d, relating to powers and duties of boards of supervisors with respect to county and township officers, deputies, assistants and employees,' as enacted by the Legislature at its fiftieth session, is hereby validated and made fully and completely effective."

Under this section of the Constitution the Assessor would fall into the category of "other etc. officers." The Legislature, pursuant to this section, has by a general and uniform law made the Assessor a county officer (§24000, Government Code).

San Francisco, however, since it is a city and county, possesses a greater authority over the office of Assessor than that which is given to counties pursuant to the above quoted section of the Constitution. San Francisco obtains this authority since it is a chartered city which has taken advantage of the provisions of Section 8 of Article XI in framing its charter and consequently possesses the additional powers granted to it by Section 8-1/2 of Article XI, which reads as follows:

> "It shall be competent in any charter framed in accordance with the provisions of this section, or Section 8 of this article, for any city or consolidated city and county, and plenary authority is hereby granted, subject only to the restrictions of this article, to provide therein or by amendment thereto, the manner in which, the method by which, the times at which, and the terms for which the several county and municipal officers and employees whose compensation is paid by such city or city and county, excepting judges of the superior court, shall be elected or appointed, and for their recall and removal, and for their compensation, and for the number of deputies, clerks and other employees that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees. All provisions of any charter of any such city or consolidated city and county, heretofore adopted, and amendments thereto, which are in accordance herewith, are hereby confirmed and declared valid."

San Francisco is in the position of having taken advantage of both Sections 8 and 8-1/2 of Article XI of the Constitution. It possesses not only authority to establish compensation of its county officers, but also has that authority which is recited in Section 8-1/2 of Article XI quoted above. The only remaining authority over county officers which the Legislature still possesses insofar as San Francisco is concerned is to fix the duties and qualifications of these various county officers. (Section 5 of Article XI, Constitution) (Nicholl v. Koster, 157 Cal. 416, 118 P. 302; Crowley v. Freud, 132 Cal. 440, 64 P. 696; Kahn v. Sutro, 114 Cal. 316, 46 P. 87)

In considering the recommendations made by your Grand Jury, however, we are not dealing with duties or qualifications of county officers. The recommendations cover the time that must be spent by a county officer in the discharge of his official duties, as well as what limits may be placed upon his outside activities. Neither of these recommendations can be said to cover either the duties or the qualifications of the county officer and consequently they are matters which by the Constitution have been intrusted to the local government for incorporation in its charter if the electorate so decide.

Since the city and county has the authority to establish the compensation for these positions, it must of necessity have the corollary to this power, which is to set the hours which must be devoted to the discharge of the duties by the officer concerned in order to determine the compensation set for the office.

It is a little more difficult to conclude that the sweeping prohibition contained in your recommendation could be applied to a county officer so that he would be prohibited completely from any other professional or business activity. I have examined this question carefully and find that there is very little on this subject in the reported decisions. The matter is frequently adverted to by the Courts in cases involving a contractual relationship but at the most such references are no more than dicta in the case. In reviewing the authorities, I feel that the language which I am quoting below from American Jurisprudence, and which is supported by a number of cases, indicates the philosophy under which these prohibitions of outside activities could be justified. In 42 Am. Jur., commencing at page 885, appears the following statement:

> "§8. Office as Trust or Agency. The American concept of a public office is that of a public agency or trust created in the interest and for the benefit of the people.

Such, at least, is the theory upon which statutes creating offices are enacted and justified. An incumbent of a public office is invested with certain powers and charged with certain duties pertinent to sovereignty. The powers so delegated to the officer are held in trust for the people and are to be exercised in behalf of the government or of all citizens who may need the intervention of the officer. Such trust extends to all matters within the range of the duties pertaining to the office. Public officers, in other words, are but the servants of the people, and not their rulers. They are amenable to the rule which forbids an agent or trustee to place himself in such an attitude toward his principal or cestui que trust as to have his interest conflict with his duty."

"§9. Office as Property or Vested Right. At common law in England, a public office was considered as an incorporeal hereditament grantable by the Crown as the source of all power and the disposer of offices. Numerous public offices were actually inheritable, especially those which were founded in immemorial usage and did not pertain to the administration of justice. But that idea of a public office does not prevail in this country. With us, a public office has never been regarded as an incorporeal hereditament, or as having the character or qualities of a grant. That a public office is the property of him to whom the execution of its duties is intrusted is repugnant to the institutions of our country, and at issue with that universal understanding of the community which is the result of those institutions. With us, public offices are public agencies or trusts, and the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right. Every public office is created in the interest and for the benefit of the people, and belongs to them. The right, it has been said, is not the right of the incumbent to the place, but of the people to the officer.

"Although some courts refer to a public office as a species of property, the decisions generally are to the effect that no one has any private right of property in such office, at least as against the public interest. The incumbent has no vested right in the office which he holds, and it is not his property within the provision of the Federal Con-

> stitution against deprivation of property without due process of law, or within an agreement in a treaty with the United States not to impair the property or rights of private individuals. The fact that the Constitution throws a mantle of protection around a public officer, such as a limitation on the power of the legislature to abolish the office or diminish the salary during the incumbent's term, does not change the character of the office or make it property.
>
> "The statement that a public office is not property means that it is not property in the sense that an officer is not denied due process of law by the abolition of his office before the expiration of his term, or by his removal or suspension according to law, or by the passage of a statute limiting or reducing his compensation, and that an officer has no property right in the books and papers pertaining to his office. But it does not follow that he has absolutely no financial or property interest which may be protected by a court of equity against wrongful interference by others, or that he may be deprived of his office without a hearing when the right to have it terminate is limited to specified causes. The incumbent's right to the office is everywhere recognized as a privilege entitled to the protection of the law, and an office may be considered as property in controversies relating to the question as to which of two persons is entitled thereto."

Therefore, it is my opinion, based upon the authority given to the city and county by the Constitution of the State of California and the general law which I have quoted above from American Jurisprudence, that as an additional condition of receiving compensation which the county has established, a county officer such as the Assessor could be prohibited by a charter amendment from engaging in any outside professional or business activities. This charter amendment may be based on the broad principles that no man can serve two masters, and an officer may be restrained from transacting business that may be incompatible with the office he occupies.

In making this decision, I am aware of the fact that any statute (and a charter section is a statute) must be sufficiently certain and definite to inform the citizen, officer or employee of the political subdivision of the acts it is intended to prohibit so that he or she may have a certain understandable rule of conduct and know what acts it is his or her duty to avoid. (U. S. v. Brewer, 139 U. S. 278 [38 L. Ed. 190]) Furthermore, if a statute uses language which is so general and indefinite as to embrace not only acts properly and legally punishable, but acts not punishable, it may be declared void for uncertainty. Statutory offenses cannot be established by implication, While it appears to me that the language suggested by the Grand Jury is very sweeping in nature, nevertheless I believe that the courts, by a common sense approach to any action taken by the Assessor which might be construed as a violation of this

section, would be in a position to preserve its validity in the face of a constitutional attack grounded upon the vague and indefinite standards which might be alleged as being contained therein.

Regarding the second portion of the recommendations made by the Grand Jury, which concerns the non-civil service employees of the Assessor's office, I am of the opinion that, for the same reasons I have heretofore given covering the Assessor, the Charter could be amended so that they would be prohibited from engaging in any outside professional or business activities. The Constitution, in Article XI, Section 8-1/2, supra, clearly confers upon a city and county which has framed a charter under Section 8 of Article XI the right to provide for the compensation of deputies, clerks and other employees of county officers. This, of itself, is sufficient authority to grant to the city and county the necessary power to place certain restrictions upon the activities of these non-civil service employees while they are engaged in the employ of the city and county.

In drafting language which will bring about your suggested changes, I find that to use the language contained in your recommendations meets with the same objection as to these non-civil service employees that I have already discussed in its application to the Assessor. These persons, though they are employees of San Francisco, not officers, should be informed upon taking their positions as to what outside activities they are prohibited from doing during their employment and this should be spelled out as clearly as possible. However, as I have already stated in discussing this matter concerning the Assessor, it becomes a question of fact.

I believe it only fair, for the purpose of aiding you in reaching a proper determination in this matter, to refer to the manner in which civil service employees are prohibited from engaging in outside employment while working for the city and county. These civil service employees of the city and county are permitted outside employment under certain conditions which are contained in Rule 36 of the Civil Service Commission. In drafting this rule the Civil Service Commission has attempted to place a reasonable restriction upon the civil service employee so that his efficiency as an employee of the city and county will not be impaired by his outside employment.

The proposal which you have recommended contains no such test, but apparently is based upon the conclusion that you have reached that, because of the unusual relationship between the office of Assessor and the public, its non-civil service personnel should be absolutely prohibited from engaging in outside professional or business activities. It may be that upon a review of the language of Rule 36, a copy of which is attached, you might consider some different language in the charter amendment which you propose to have introduced in the Board of Supervisors for final decision by the electorate.

I also wish to call your attention to the fact that any charter amendment submitted by the Board of Supervisors could not possibly be placed upon the ballot any earlier than the primary election in the early summer of next year or in the November election of next year, and that if it were favorably passed upon by the people of San Francisco it could not be ratified by the Legislature until the 1957 session. Therefore, it would not become effective until sometime in the early part of January, 1957. There is always a possibility that the Governor may call a special session of the Legislature in the latter part of 1956, and in such case any amendment which was adopted by the people would be introduced for ratification at that time.

I am attaching hereto a draft of the charter amendment in language that will meet the objectives proposed by your body, with certain additional safeguards which, in my opinion, will negate any of the objections as to its constitutionality.

Yours truly,

DION R. HOLM
City Attorney

Enclosures

BJW

RULE 36 - HOLDING OF MORE THAN ONE SALARIED POSITION

Except with the approval of the Civil Service Commission as herein provided, no person holding a position under civil service appointment in this jurisdiction shall accept any employment, position or service, in or out of the service of the San Francisco municipal government, in which he is required to perform any duties and for which he is to receive any compensation in any form including salary, wage, fee, commission or emolument.

Such persons who desire to accept other employment in addition to their regular municipal employment must make a request of the Civil Service Commission for such permission on a form provided by the Commission. The request must first have the approval and affirmative recommendation of the officer having appointive power over the full time civil service position of the employee who is making the request. The request must contain a statement reporting the nature of the other employment or service which the employee desires to undertake and the duties thereof; the usual place of the employment or service; the approximate total number of hours of service required of the employee per week, and the work schedule; and the name of the person, firm, or official for whom, or under whom, the service is to be performed and a statement by such person to the effect that he understands that the employee is regularly employed in the city and county service on a full time basis.

The Civil Service Commission, on the basis of investigation and report by the Personnel Director and Secretary shall decide whether the performance of the duties of the other employment or service will impair the efficiency of such employee in his regular civil service employment or interfere in any way with the full and proper performance of the duties of his regular civil service position, or if the performance of the other service may be contrary to the best interests of the city service in any respect or may lead to situations which would reflect discredit on the city service. If in the opinion of the Commission the acceptance of such other service by such employee would in any manner impair the efficiency of the employee in the performance of his regular municipal duties or interfere therewith, or that the acceptance of the other service may be contrary to the interests of the city service or may lead to situations which would reflect discredit on the city service, the Commission shall deny such request. The Commission will not approve any request to accept other service which under any circumstances will require more than 24 hours per week of work or service, nor when the combined work schedules of the other service and the municipal employment exceed eleven (11) hours on any day, nor any request which entails any duty whatsoever of the employee during his regular municipal work schedule.

The Personnel Director and Secretary shall withhold approval of the salary of any such employee who accepts any other position, employment or service, except in accordance with the provisions of this rule and the acceptance of any such other employment or service

except in accordance with this rule shall be deemed insubordination and subject to disciplinary procedure as provided in Section 154 of the charter.

For purposes of this rule the term "employment" or "service" when used in connection with employments or service elsewhere than in the municipal service, includes also positions as well as any service performed or to be performed by an employee in addition to that performed by him in his regular civil service position. The term "compensation" means any form of payment in cash or in kind for the performance of services rendered including salaries, wages, fees, commissions or other emoluments.

The term "employee" when used in connection with employment within the city and county government means also "officer", and the term "position" when used in connection with the municipal service means also "office".

The provisions of this rule do not apply to members of the Police or Fire Departments.

Amended Minutes of July 6, 1955.

CHARTER AMENDMENT

Describing and setting forth a proposal to the qualified electors of the City and County of San Francisco to amend the charter of said city and county by adding thereto section 28.1 providing for the office hours and prohibiting outside activities of the Assessor and his non-civil service employees.

The Board of Supervisors of the City and County of San Francisco hereby submits to the qualified electors of said city and county at an election to be held therein on ________ ________________, a proposal to amend the charter of said city and county by adding thereto section 28.1 to read as follows:

ASSESSOR

(Continued)

Section 28.1. The assessor shall devote his entire time during office hours to the duties of his office. The assessor, his chief assistant or deputy and his confidential secretary shall not engage in any professional or business activities incompatible with the interests of the city and county. Violation of this section shall constitute official misconduct or insubordination for which the assessor, his chief assistant or deputy and confidential secretary shall be removed from office or employment in accordance with the procedures outlined in this charter.

OPINION NO. 1005

OCTOBER 28, 1955

SUBJECT: HEALTH SERVICE BOARD, PROPRIETY OF REPRESENTATION BEFORE BOARD BY DIRECTOR OF BOARD OF HEALTH SERVICE EMPLOYEES RESPECTING THEIR EMPLOYMENT AND DUTIES; LETTERS AS THREATS CONTRARY TO SEC. 650, PENAL CODE

Dear Sir:

I have your request for opinion as follows:

"I am writing you as Director of the Health Service Board and upon agreement of the President and the Office Committee of which I am Chairman, to request your opinion on the following matters:

"These matters arise from a letter dated October 7, 1955, directed to me as Chairman of the Office Committee, by Director John M. Dean of the Health Service Board, copy of which is enclosed. Also enclosed is copy of a letter referred to by Mr. Dean in his communication, which was written February 20, 1953, by Mrs. Zella B. Haynes, then in charge of the staff of the Health Service System, to Miss Grace Chaquette (now Mrs. Grace Stenson), of the Health Service staff. The reason for Mrs. Haynes' letter is indicated by its context.

"There are two matters involved, the first of which must be explained briefly:

"Within the past few weeks, one Health Service System employee objected to the Director's reassignment of her duties, as a result of which Mr. John M. Dean was announced as representing her and other members of the staff; in fact, Director Dean appeared at five o'clock on or about August 5th, 1955, in the offices of the Health Service System, with three members of the Health Service staff, and asked the Secretary, Mrs. Haynes, where the meeting of the Office Committee was being held. Upon being advised that the Office Committee had met on the matter (at the request of the Director) he stated to the Secretary that he represents these employees and desired notification of any future meeting of the said committee.

"Will you give us your considered opinion on the following questions:

"1. Does representation in staff matters, against the administration of a department, by a Director of the Health Service Board who is also an attorney violate Section 22 of the Charter? We have your Opinion No. 983 interpreting this section.

"2. Does Mrs. Haynes' letter of February 20, 1953, to a member of her staff constitute a misdemeanor under Section 650 of the Penal Code?

> The conditions under which this employee entered the department after dismissal from another Civil Service position, were special action of the Health Service Board creating a permanent position in the department for her, as shown in the Minutes of the regular meeting of March 22, 1949, as follows:
>
> 'Motion made by Director Dean, seconded by Director McGovern, that application be made for a permanent tabulating machine operator, IBM, with the understanding that Miss Grace Chaquette, who is presently filling the position, is in line for the appointment. Disposition of motion: Carried.'

"3. Does Mr. Dean's letter dated October 7, 1955, addressed to me, copies of which were mailed to various Health Service System employees inferior in authority to Mrs. Haynes, constitute a misdemeanor under Section 650 of the Penal Code quoted therein, and a 'conspiracy to violate Section 650 of the Penal Code'?

"4. If your answer to Q. 1 and Q. 3, or either of them is 'Yes,' do these acts, in your opinion, constitute Official Misconduct under Sections 22 and 223 of the Charter?

"5. If your reply to Q. 4 is 'Yes,' what procedure would apply in the circumstances?"

The copy of letter of October 7, 1955, to which you refer reads:

"550 Montgomery Street
San Francisco 11, California
October 7, 1955.

"Mr. George J. Gallagher
3817 - 22nd Street
San Francisco, California

Dear Mr. Gallagher:

"In August of this year you called me relative to a dispute which had occurred between Health Service System Medical Director Dr. Walter Hook and a number of civil service employees in the office of the Health

Service System. You called me as chairman of the Office Committee of the Health Service Board after you had been informed by one of the employees that I, as an attorney, represented the particular employees in seeing that their rights were protected.

"Prior to August there had been an unwholesome situation in the Health Service System office for almost a year involving frictions, tensions and disputes between Dr. Hook and the office personnel. As the result of their differences with Dr. Hook some employees of the Health Service System were reduced to tears in the office before their fellow employees, and suffered both physical and mental anguish.

"In August you promised that there would be a hearing before your Office Committee so that the employees involved could set forth their side of the controversy. I requested that the hearing be held at a time when Director George W. Cuniffe could be present, since he was present when one incident occurred in the office.

"Unfortunately, Mr. Cuniffe went on his vacation in the latter part of August. When he returned I happened to leave on my vacation. Otherwise, a request would have been made earlier for the hearing before the Office Committee.

"Will you please call me at DOuglas 2-2838 so that we may agree upon a date for the hearing before your Office Committee.

"At the same hearing I wish your Committee to consider the letter of February 20, 1953, which Mrs. Zella Haynes sent to Miss Grace Chaquette (now Mrs. Grace Stenson) wherein Mrs. Haynes threatened to take certain matters involving Mrs. Stenson to the Health Service Board, 'including the conditions under which you entered this department.'

"As you are undoubtedly aware Section 650 of the Penal Code provides as follows:

> 'Every person who knowingly and wilfully sends or delivers to another any letter or writing, whether subscribed or not, threatening to accuse him or another of a crime, or to expose or publish any of his failings or infirmities, is guilty of a misdemeanor.' (Emphasis added).

"Furthermore, you are also undoubtedly aware of the fact that a conspiracy to violate Section 650 of

the Penal Code is a felony.

"Very truly yours,

"(Signed) John M. Dean

"JMD/jl
cc to
George W. Cuniffe and
various Health Service
System employees."

The copy of letter of February 20, 1953, referred to, reads:

"February 20, 1953

"Dear Grace:

"Your leaving the office this afternoon without permission or satisfactory explanation is entirely out of order. Any difficulties you may have should have been brought to Con or to me.

"Your taking sick leave, as you intimated to Con, following this prima donna display, will have doubtful validity.

"Unless you appear on Tuesday morning I shall take the matter up at the Board meeting on Tuesday night, including the conditions under which you entered this department. If you wish to appear at that meeting to speak for yourself you may do so. If you return on Tuesday please do so with the intention of normal cooperation with the other workers in your department. I should like to see you when you come in.

"In haste,

"Miss Grace Chaquette
1086 Post St.
San Francisco 2"

OPINION

1. Answer to Question 1.

My answer is yes.

The Health Service System* is a department of the government of the City and County of San Francisco. (Op. #983, Aug. 18, 1955; Butterworth v. Boyd, 12 C. 2d 140) Members of the Health Service Board are officers of the City and County of San Francisco (O'Marie v. Cuniffe, Superior Court Action No. 408305), and hence entitled to receive my opinion in writing whenever requested. (Charter §26, par. 2) Employees of the Health Service System are employees of the City and County of San Francisco. They belong to the Retirement System (Cannon v. Brady, Superior Court Action No. 295411), and, except for the Medical Director, are subject to the civil service provisions of the Charter. (Charter §172.1, subd. 3(d))

The President of the Health Service Board acts as the appointing officer, under the civil service provisions of the Charter (§§140-157), for the appointing, disciplining and removal of such employees as may be authorized by the Board. (Charter §172.1, subd. 2)

In other matters the Medical Director occupies the position of a department head and is the Board's chief executive officer. (Op. #983, Aug. 18, 1955)

Each board of the City, in the conduct of the administrative affairs under its control, must deal therewith solely through its chief executive officer (Charter §22, par. 1), and is forbidden to deal therewith in any other manner. (Charter §22, par. 2)

The Medical Director of the Health Service System is subject to the control of the Health Service Board, but neither he nor any other employee is accountable to individual members of the Board. Individual Board members may not arrogate to themselves powers which the Charter has conferred only on the Board acting as a Board. They have no right to interfere with the internal office administration of the Health Service System. (Op. #983, Aug. 18, 1955) Such interference constitutes official misconduct. (Charter §22, par. 2)

When a Board member, who also is an attorney, undertakes, in his capacity as an attorney, to represent employees of the System in connection with their grievances involving the internal administration of the System, he violates Charter §222 which provides that "No member of any board . . . shall accept any employment relating to . . . the affairs of any person . . . which are subject to regulation

---

* The Health Service System is a million dollar-a-year municipal operation. The moneys come into the public treasury, not from taxes, but from compulsory employee payroll deductions. (Charter §172.1, subds. 4, 6)

by the board . . . of which he is a member. . . . Violation of any of the provisions of this section shall constitute official misconduct."

These grievances and all of the facts surrounding them are affairs subject to the regulation and control of the Health Service Board. How could a Board member who, as their attorney, has undertaken to represent such aggrieved employees in the favorable resolution of their grievances, turn around and, sitting as a Board member, impartially regulate such grievances? As a Board member he is a public agent and must uphold the public interest. As attorney for these employees, he is their private agent and must champion their personal interests. The conflict of interest prohibited by Charter §222 is clear. No man can serve two masters.

Even in the absence of statute, a public officer who accepts another incompatible *public* office loses his first office. (*People v. Rapsey*, 16 C. 2d 636) *A fortiori*, a public officer violates his trust when he accepts *private* incompatible employment.

2. *Answer to Question 2*.

My answer is no. Section 8 of the rules and regulations adopted by the Health Service Board provides that the secretary of the Board shall assume the executive and administrative powers and duties of the medical director during his absence; further that the medical director is responsible for the efficient administration of the system, and when he deems it necessary to take disciplinary action (other, of course, than disciplinary action under the provisions of Charter §§140-157), he shall submit his recommendations to the Health Service Board for action. The letter of February 20, 1953, was written by the Secretary of the System in line of official duty, and as a notice to the employee of matters which would be brought before the Board, and of the time and place thereof. It was a privileged communication and not a violation of Penal Code §650.

See generally on privilege, 2 Wharton's Criminal Law, 12th ed., Ruppenthal, §§1967-82, pp. 2290-2304.

It is unnecessary to note that the one year period of limitation on misdemeanor prosecutions (Penal Code §801), rendered academic as of February 1954 the question whether the letter of February 20, 1953, constituted a violation of Penal Code §650.

3. *Answer to Question 3*.

My answer is no.

Were the communication of October 7, 1955, sent by one Health Service Board member, acting as such, to another, concerning Board business, it would be a privileged letter and, like the one of February 20, 1953, above, not within the purview of Penal Code §650. (Compare Wharton, supra, §1970)

This letter was sent, not by one Board member, acting as such, to another, but by a Board member acting as attorney for certain Health Service System employees in seeing that their rights were protected. As such, the communication is likewise privileged and not a violation of Penal Code §650. (See Wharton, supra, §1976)

As to the copies of this letter sent to "various Health Service System employees," these presumably are the employees whom the sender, "as an attorney, represented . . . in seeing that their rights were protected." A lawyer's communications with his clients, for example, by sending them copies of his correspondence with third persons in order to keep them apprised of the status of their cases, are privileged and do not fall within the scope of Penal Code §650. (See Wharton, supra,§§1967-68)

There are, of course, limits to what may be said under the guise of privilege. For example, it is said that the privilege applies "if there be no malice." (Wharton, supra, §1967) It is unnecessary to go into this phase of the matter for it is an attorney's duty zealously to advocate his client's cause, and such zeal, when exercised within reasonable limits, is not malice in law.

4. Answer to Question 4.

The conduct referred to in your Questions 1 and 3 in my opinion constitutes a violation of Charter §§ 22 and 222, and is therefore official misconduct. Specifically, that conduct constituted an interference by a Board member with the administration of the affairs of the Health Service System (§22), and the acceptance and performance by a Board member of private employment relating to the affairs of Health Service System employees which are subject to regulation by the Health Service Board. (§222)

Charter §223, to which you refer, states the penalty for, and is not a specification of what constitutes, official misconduct.

5. Answer to Question 5.

The removal procedure set forth in Charter §11, par. 1, applies in the circumstances. That section provides that any "elective officer" may be suspended by the mayor and removed by the board of supervisors for official misconduct, and outlines the procedure to be followed by them.

"Elective officer" (§11) means an officer who holds office by election rather than by appointment. (Mono County v. I.A.C., 175 C. 752, 754) It was the intent of the framers of the Charter that official misconduct of any elective officer under §§22 and 222 be dealt with pursuant to §11.

A Health Service Board member is an "elective officer." He is "elected" by the members of the Health Service System in an election conducted by the registrar of voters. (§172.1, subd. 2) Any contention that the "elective officer" referred to in §11 means only an officer elected by a vote of all the people, would violate the settled rule against inserting in a statute what has been omitted therefrom. (C.C.P. §1858)

San Francisco has plenary authority to make provision in its charter for the removal of its officers. (Cal. Const., art. XI, §8-1/2, subd. 4) Since the removal procedure provided by §11 governs, there is no need to discuss the removal procedure (Gov. Code §§3060-73) which, in the absence of §11, would apply.

You are advised accordingly.

Respectfully submitted,

DION R. HOLM
City Attorney

GEB/RS

To: George J. Gallagher, Chairman
Office Committee
Health Service Board
61 Grove Street
San Francisco 2

Opinion No. 1006
October 31, 1955

SUBJECT: EFFECT OF EDUCATION CODE SECTION 19611.3 AS TO RETIREMENT CREDIT FOR PRIOR SERVICE BY CHILD CARE CENTER EMPLOYEES BEFORE MEMBERSHIP IN THE SAN FRANCISCO EMPLOYEES' RETIREMENT SYSTEM WITHOUT CONTRIBUTIONS THEREFOR BY SAID EMPLOYEES; NECESSITY OF ACTION BY BOARD OF SUPERVISORS.

Dear Sir:

We have your request for an opinion as follows:

REQUEST

"A question has been raised by a provision in new School Code Section 19611.3, which was passed by the recent Legislature and signed by the Governor, and is now effective as an emergency measure. The question relates to credit for prior service rendered to the San Francisco Unified School District, by persons employed in the Child Care Centers established in that district.

"The following statements are submitted in the matter:

"Section 19611 which was added to the Education Code in the early 1940s, at the time Child Care Centers were authorized, provided that no person employed in a Child Care Center could become a member of a retirement system. Actually, the section referred to a 'district retirement system', but that term was interpreted as including the San Francisco City and County Employees' Retirement System.

"The San Francisco Unified School District established Child Care Centers when they were first authorized, and has maintained them since that date. Persons employed in the centers, however, have been excluded from membership in the San Francisco City and County Employees' Retirement System, because of the language in Section 19611, referred to in item (1), and regardless of the San Francisco Charter Sections and Article 3, Part I of the Municipal Code, which would have permitted them to become members here.

"Section 19611 of the Education Code was amended in the 1955 regular session of the Legislature, by Assembly Bill 980. As stated above, this bill was passed by the Legislature, signed by the Governor in due course, and now is effective as an emergency measure. The prohibition against retirement membership was stricken from Section 19611. Persons employed in San Francisco Centers and previously excluded became members of this system forthwith.

* * * * *

> "(Section 19611.3, as added to the code,) would grant credit for prior service without contributions from members, and would base the allowance on the average salary earned in 1954-55, instead of during the highest five consecutive years of service, as in our charter. The question arises as to whether this legislation in the Education Code governs, as to (a) prior service credit and (b) benefit formula, or whether amendment to the San Francisco Retirement Law, whether to the charter or the Retirement Ordinance, is necessary with respect to (a), and whether the present clear charter provisions as to (b) would govern. In your Opinion No. 671, 'prior service' was interpreted to include service rendered prior to the date upon which a particular section of miscellaneous members became effective, such as persons employed under a temporary Civil Service status, provided the Supervisors so defined it for Section 165 members. In groups such as temporary employees, legislation by the Supervisors was considered to be necessary to give credit for such service, but credit was granted only on the condition that the employees waive their rights under the charter provision giving prior service credit without employee contributions, and elect instead to contribute according to what they would have paid had he been a member throughout the period.
>
> "The question arises as to whether the procedures applied to the temporary service, should be followed in connection with Child Care Center service, or whether, indeed, the legislative action governs, giving credit for such prior service without contributions from the member, and without action of the Supervisors. . . .

* * * * *

"You are requested, therefore, to give your opinion on the following two questions:

> "(a) whether the provisions of new Section 19611.3 of the Education Code governs, and, therefore, whether the Retirement Board must proceed with giving credit for service rendered by these Child Care Center employees prior to the effective date of Section 19611.3, without contributions on their part, or
>
> "(b) whether the charter provisions have precedence over the legislative action, as far as the San Francisco City and County Employees' Retirement System is concerned, and, therefore, whether, the Board of Supervisors must act with respect to this prior service, in the same manner that their action was required in connection with the temporary employees, which

was in accordance with your Opinion No. 671. If the Supervisors do act in that manner, they then would have to decide whether prior service contributions would be required of these Child Care Center employees, as a condition for credit."

OPINION

Section 19611 of the Education Code as adopted in 1943 provided as follows:

> "§19611. No person employed in a child care center under the provisions of this chapter shall be deemed to be a person employed by a school district in a position requiring certification qualifications or employed in a status requisite for membership in the State Teachers' Retirement System or district retirement system, or an employee subject to the provisions of Article 5 of Chapter 13 of Division 7 of this code."

It will be noted that this section in effect provided that no person employed in a Child Care Center should be deemed employed by a school district in the status requisite for membership in a district retirement system.

You stated in your request that in view of this section of the Education Code persons employed in the Child Care Centers established by the San Francisco Unified School District heretofore have been excluded from membership in the San Francisco City and County Employees' Retirement System. Were it not for this exclusion such persons heretofore would have been permitted to become members of our Retirement System under the provisions of Section 165.2(A) of the Charter, and Section 200(c), (f), (k) as well as Section 221(a), (b), (c) of Article 3, Part I of the San Francisco Municipal Code.

At the last session of the Legislature this section of the Education Code was amended and Section 19611.3 was added, both becoming effective as of July 1, 1955, so as to now read as follows:

> "19611. Each person employed by a school district in a child care center under the provisions of this chapter shall be deemed for all purposes, including retirement, to be a person employed by the school district in a position not requiring certification qualifications, except that he shall not be subject to the provisions of Article 5 of Chapter 13 of Division 7 of this code."

"19611.3. Any city, county, or city and county charter provision to the contrary notwithstanding, each person employed by a school district on the date this section becomes operative who was theretofore excluded, solely by reason of the provisions of Section 19611 in effect prior to that date, from membership in any retirement system in which the district participates or to which it contributes for the purpose of providing retirement rights and benefits for employees of the district not employed in a status requisite for membership in the State Teachers' Retirement System, shall become a member of the retirement system from which he was so excluded, on the date this section becomes operative. Every such member shall be entitled to credit for service in child care centers rendered prior to July 1, 1955, and before he became a member of the system, in the same manner as if he had not theretofore been excluded from membership in the retirement system, except that he shall not be required to make any contributions to the retirement system in respect to such service rendered prior to his membership, and all contributions necessary to provide benefits on account of such service shall be paid to the retirement system by the school district by which the member is employed. For the purpose of computing benefits for services rendered prior to July 1, 1955, as provided in this section, the average monthly salary earned by such employee in the Fiscal Year 1954-55 shall be used.

"The provisions of this section shall not be applicable to any person whose service for the district has been brought under the coverage of the old age and survivors insurance provisions of the Social Security Act, unless all noncertificated employees of the district are under such coverage."

Under this amendment persons employed in Child Care Centers are no longer prohibited from becoming members of any retirement system in which their school district participates - and hence, as you have indicated, such persons employed in San Francisco Centers became members of our Retirement System immediately upon the effective date of this legislation.

Now you ask whether the provisions of the new section, 19611.3 of the Education Code, control insofar as concerns the granting of "prior service" credit (i.e., prior to July 1, 1955) to persons employed in the San Francisco Child Care Centers, and insofar as concerns whether or not contributions shall be required on their part.

In this connection Section 19611.3 of the Education Code provides in part as follows:

> "Every such member shall be entitled to credit for service in child care centers rendered prior to July 1, 1955, and before he became a member of the system, in the same manner as if he had not theretofore been excluded from membership in the retirement system, except that he shall not be required to make any contributions to the retirement system in respect to such service rendered prior to his membership, and all contributions necessary to provide benefits on account of such service shall be paid to the retirement system by the school district by which the member is employed."

The creation of a pension or retirement system, such as our San Francisco City and County Employees' Retirement System, is a municipal affair and the determination of who may be included as a member and what, if any, contribution shall be made by such a member is strictly a "municipal affair" and cannot be directed or dictated by State law. Butterworth v. Boyd, (1938) 12 Cal. 2d 140, 147; Klench v. Board of Pension Fund Commrs., (1926) 79 Cal. App. 171, 179.

So here, persons employed in San Francisco Child Care Centers have been included as members of our San Francisco Retirement System since July 1, 1955, because our Charter and ordinances permit of their inclusion as such members, and not because of any requirement by State law. This same general principle is applicable in connection with the granting to such employees of "prior service" credit, i.e., credit prior to July 1, 1955.

Section 19611.3 of the Education Code cannot require our Retirement System to grant "prior service" credit herein, with or without contributions from the employee. Whether "prior service" credit is to be granted at all to such employees, and if so granted whether contributions are to be required of them as a condition for such credit, is a matter governed strictly by our Charter and ordinances enacted by our Board of Supervisors pursuant thereto. The authority of the Board of Supervisors to act in matters of "prior service" credit is covered by my opinion to you dated March 9, 1953, No. 671, and by my opinion to the Board of Supervisors dated March 5, 1955, No. 797.

Thus, in answer to your first inquiry, you are advised that Section 19611.3 of the Education Code does not control insofar as concerns the granting "prior service" credit to persons employed in the San Francisco Child Care Centers, or insofar as concerns the determination as to whether contributions shall or shall not be required on the part of such employees. These are matters for the determination of our Board of Supervisors, as has been previously indicated.

You next ask whether the provision of the new Section 19611.3 of the Education Code controls insofar as it provides for a "benefit formula" based on the average monthly salary earned by a member of the fiscal year 1954-55 as follows:

> "For the purpose of computing benefits for services rendered prior to July 1, 1955, as provided in this section, the average monthly salary earned by such employee in the Fiscal Year 1954-55 shall be used."

Persons employed in the San Francisco Child Care Centers come under the provisions of Section 165.2 of our Charter, in connection with retirement matters. This section establishes a "benefit formula" based upon the average monthly salary earned by a member during any five consecutive years of credited service as follows:

> (SECTION 165.2. (A)) ". . .'Average final compensation' shall mean the average monthly compensation earned by a member during any five consecutive years of credited service in the retirement system in which his average final compensation is the highest, excluding that part of such remuneration which exceeds $500.00 per month, unless the board of supervisors shall otherwise provide by ordinance enacted by three-fourths vote of all members of the board."

For the reasons heretofore related in connection with our discussion on "prior service" credit, the establishment of a "benefit formula" for City service (in this case concerning itself with service prior to July 1, 1955) is strictly a "municipal affair" and therefore our Charter provision, supra, which sets forth a "benefit formula" based upon the average monthly compensation earned by a member during any five consecutive years of credited service is controlling.

Hence, in answer to your final inquiry, you are advised that Section 19611.3 of the Education Code does not control insofar as concerns a determination of the method of computing benefits for services rendered prior to July 1, 1955.

You are thus advised in connection with your inquiry as submitted.

Respectfully submitted,

NSW/WFB

DION R. HOLM
City Attorney

To: Mr. Ralph R. Nelson
Consulting Actuary
Retirement Board
San Francisco City and County
Employees' Retirement System
460 McAllister Street
San Francisco 2.

OPINION NO. 1007

November 1, 1955

SUBJECT: RETIREMENT SYSTEM; VALIDITY OF ELECTION TO ALLOW CONTRIBUTIONS TO REMAIN UNDER CHARTER SECTION 165.2, SUBD. F, EXECUTED AFTER TERMINATION OF EMPLOYMENT IN DEPARTMENT OF ELECTRICITY, BUT WHILE A TEACHER IN SAN FRANCISCO UNIFIED SCHOOL DISTRICT; PRESENT AND FUTURE RIGHTS UNDER SUBD. F; HAROLD L. GERBER.

Dear Sir:

This will acknowledge receipt of your request for opinion as follows:

REQUEST

> "The Retirement Board, at its regular meeting on Wednesday, August 31, 1955, has directed that the pertinent facts connected with the membership of Harold L. Gerber, member No. 4745, Inspector in the Department of Electricity and Teacher in the Adult Program of the San Francisco Unified School District, be recited to you, and that your opinion be requested on certain questions arising as a result of Mr. Gerber's employment.
>
> "The following facts, therefore, are submitted:
>
> "(1) Mr. Gerber first became a member of the San Francisco City and County Employees' Retirement System effective March 1, 1924, as an Inspector in the Department of Electricity.
>
> "(2) On February 4, 1930, he was employed by the San Francisco Unified School District as a Teacher in the 'Evening School' in the Horace Mann School.
>
> "(3) On May 4, 1931, Mr. Gerber terminated his employment with the City and County and the Unified School District and his contributions were refunded to him at his request, thereby terminating his membership in the Retirement System.
>
> "(4) On July 1, 1932 he was re-employed in the Department of Electricity, his membership in the Retirement System becoming effective on that date.
>
> "(5) Mr. Gerber, on July 29, 1932, elected not to redeposit the contributions withdrawn on May 4, 1931, and therefore his renewed membership in the Retirement System became effective July 1, 1932.

"(6) On December 4, 1946, Mr. Gerber was dismissed from the position of Chief Inspector, Department of Electricity, and he appealed to the Civil Service Commission within the thirty day Charter limitation for a review of his dismissal, and as a result the Civil Service Commission changed his dismissal to that of 'suspension.'

"(7) On February 18, 1947, Mr. Gerber received a temporary appointment as Evening School Teacher, which was subsequently changed to Probationary Teacher as of the same date.

"(8) On July 2, 1947, the suspension from his position as Chief Electrical Inspector in the Department of Electricity was lifted and subsequently Mr. Gerber resigned. At the time of his resignation he was a member under Section 165.2 and as a member with over ten years of service had the right, under Section 165.2 (F) of the Charter, to elect to allow his accumulated contributions to remain in the Retirement Fund and to receive benefits only as provided in Section 165.2 (F).

"(9) On September 2, 1947, he exercised his right to leave his accumulated contributions in the Retirement System on a form provided by the Retirement Office. This election was accepted by the Retirement System in the absence of any knowledge that Mr. Gerber was then employed as a Teacher with the San Francisco Unified School District.

"(10) On February 4, 1948, Mr. Gerber's services as a Teacher were discontinued.

"(11) In October, 1951, he was re-employed as a Teacher in the Adult Training Program of the Unified School District, while still a member of the Retirement System.

"(12) On February 28, 1952, he resigned his teaching position, no contributions had been deducted from his salary warrants while employed in this capacity, but a letter dated February 29, 1952, requesting that the School Department make deductions for contributions into the Retirement System was sent without the knowledge that Mr. Gerber had resigned the previous day.

"(13) A form giving Mr. Gerber the privilege of election to allow his accumulated contributions to remain in the Retirement System was mailed to 1916 Rockdale Drive,

San Francisco, California. This form was returned to the Retirement Office on May 13, 1952, with a notation thereon, 'Returned for Better Address, No Such Street Number.' Subsequently it was determined that the correct address should have been '916 Rockdale Drive, San Francisco, California.'

"(14) As of January 31, 1953, Mr. Gerber's membership was terminated, a warrant was drawn for his accumulated contributions in an amount of $2,919.24. Mr. Gerber was advised that the warrant had been drawn and was available at the Retirement System Office, and that his membership in the Retirement System was terminated. The warrant was not accepted by Mr. Gerber and it was, therefore, returned to the Controller, where it is being held.

"The questions before the Retirement Board are:

"(1) Whether or not Mr. Gerber's election under Section 165.2 (F) is legally valid inasmuch as at the time he made this election he was employed in the San Francisco Unified School District as a Teacher in the 'Night School Program.'

"(2) Has Mr. Gerber any further legal rights of election under Section 165.2 (F) to allow his accumulated contributions to remain in the Retirement Fund and to receive benefits only as provided in Section 165.2 (F)?"

OPINION

The essential facts insofar as your inquiries are concerned are as follows:

1. Mr. Gerber's membership in the Retirement System dates from July 1, 1932, when he was re-employed in the Department of Electricity.

2. On February 18, 1947 Mr. Gerber received a temporary appointment as an evening school teacher with the San Francisco Unified School District, which appointment was later changed to a probationary teacher as of the same date.

3. On or about July 2, 1947 Mr. Gerber resigned from his position with the City as Chief Electrical Inspector, Department of Electricity, and at the time of his resignation he was a member of the Retirement System under Section 165.2 of the Charter, with over ten years of service.

4. On September 2, 1947 he purportedly filed an election to allow his accumulated contributions to remain in the Retirement System under Section 165.2 (F) of the Charter in the light of his ten years of service with the City and County of San Francisco, and to receive benefits only as provided in Section 165.2 (F) of the Charter. This purported election was filed at the office of the Retirement System without the Retirement System then being actually aware of the fact that Mr. Gerber at that very same time was employed as a teacher with the San Francisco Unified School District.

5. On February 4, 1948 Mr. Gerber's services as a teacher with the San Francisco Unified School District (which had continued from February 18, 1947) were discontinued.

6. On October 1, 1951 Mr. Gerber was again employed as a teacher in the Adult Training Program of the San Francisco Unified School District, in which position he continued to serve until he resigned therefrom on February 28, 1952.

7. The Retirement System did not ascertain that Mr. Gerber was working with the San Francisco Unified School District from February 18, 1947 through February 4, 1948, or from October, 1951 through February 28, 1952 until on or about February 29, 1952 when a letter was sent the School Department requesting that deductions be made for Mr. Gerber's contributions as moneys due to the Retirement System. Mr. Gerber had resigned from his position with the School Department the day before, and hence no deductions had been made by the School Department from Mr. Gerber's salary for retirement purposes.

8. We are informed that on or about May 12, 1952 the Retirement System voluntarily sent Mr. Gerber a form under which he might elect to exercise the privilege of allowing his contributions to remain with the Retirement System, under Section 165.2 (F) of the Charter, which was mailed to "1916 Rockdale Drive, San Francisco, California." This form was returned to the Retirement office on May 13, 1952, with the notation thereon, "returned for better address. No such street number." Subsequently it was determined that the correct address should have been "916 Rockdale Drive, San Francisco, California."

The first question you ask is whether Mr. Gerber's purported election of September 2, 1947 to leave his accumulated contributions remain in the Retirement fund under Section 165.2 (F) of the Charter, was legally valid inasmuch as at the time he attempted to make this election he was employed by the San Francisco Unified School District as a teacher in the night school program.

Teachers in the San Francisco Unified School District are members of the City and County of San Francisco Employees' Retirement System. (§§165(a); 165.2(H)(2) of the Charter.)

The right of a member entitled to be credited with ten years service to elect to leave his accumulated contributions to remain in the Retirement System is granted by Section 165.2(F) of the Charter under the following conditions:

> "SECTION 165.2 (F) Should any miscellaneous member cease to be employed as such a member, through any cause other than death or retirement, all of his contributions, with interest credited thereon, shall be refunded to him subject to the conditions prescribed by the Board of Supervisors to cover similar terminations of employment and re-employment with and without re-deposits of withdrawn accumulated contributions of other members of the retirement system, provided that if such member is entitled to be credited with at least ten years of service, he shall have the right to elect, without right of revocation and within 90 days after said termination of service, or if the termination was by lay-off, 90 days after the retirement board determines the termination to be permanent, whether to allow his accumulated contributions to remain in the retirement fund and to receive benefits only as provided in this paragraph. Failure to make such election shall be deemed an irrevocable election to withdraw his accumulated contributions. . . ."

It will be noted that the right of election is only granted "should any miscellaneous member cease to be employed as such a member, through any cause other than death or retirement" -- and then the election must be exercised, without right of revocation, "within 90 days after said termination of service," and "failure to make such election" shall be deemed an irrevocable election to withdraw the accumulated contributions.

From the hereinbefore stated facts, it appears that on September 2, 1947 when Mr. Gerber sought to elect to leave his accumulated contributions with the Retirement System under the provisions of Section 165.2 (F) of the Charter, he had not then ceased to be employed as such a miscellaneous member of the Retirement System -- rather, he then still retained his membership in the Retirement System as a teacher with the San Francisco Unified School District through the year 1947 and thereafter. Mr. Gerber, still being a member of the Retirement System at the time of the purported

exercise of option, had no right to exercise the same under the limitation provided and contained in Section 165.2(F) of the Charter -- hence, his purported exercise of such a right on September 2, 1947 was a void and meaningless act.

The first time Mr. Gerber might have made a proper election to leave his accumulated contributions with the Retirement System under Section 165.2 (F), was after he resigned as a teacher on February 4, 1948. He did not make any such election at that time. Thereafter, he again became employed with the San Francisco Unified School District in the Adult Training Program in October, 1951, and served in such capacity until he resigned therefrom on February 28, 1952. Under normal circumstances such latter severance would have afforded Mr. Gerber an opportunity to elect to leave his accumulated contributions with the Retirement System under Section 165.2 (F) of the Charter. He did not make any such election at this time either. The fact that the Retirement System on or about May 12, 1952 unsolicitedly endeavored to send Mr. Gerber a form that he might use to exercise such an option, and that the form was sent to the wrong address, is of no avail to Mr. Gerber - for the Retirement System was under no duty or obligation to send this form, it was a mere volunteered effort. The obligation was upon Mr. Gerber to see that his election was duly made within the period allowed by the Charter, as upon his failure so to do, it would be deemed that an irrevocable election was made to withdraw his accumulated contributions.

Hence, in answer to your first inquiry, you are advised that a purported exercise of right of election on September 2, 1947 was not made in conformity with the requirements of Section 165.2 (F) of the Charter, and was therefore void and of no avail.

You next ask whether Mr. Gerber has any further right of election under Section 165.2 (F) of the Charter to allow his accumulated contributions to remain in the Retirement fund. The answer to this must be in the negative, as the time for exercising the right of election under his last employment with the San Francisco Unified School District expired 90 days from February 28, 1952.

You are thus advised in connection with the inquiries as submitted.

Respectfully submitted,

DION R. HOLM
City Attorney

NSW/WFB

TO: IRA L. THOMPSON, Secretary,
Retirement System Board
460 McAllister Street
San Francisco 2

OPINION NO. 1008
November 1, 1955

SUBJECT: ZONING, FIRST RESIDENTIAL DISTRICT IN WHICH A QUARRY IS PERMITTED, CAN PERMIT FOR CONSTRUCTION OF ROCK CRUSHING AND SCREENING PLANT BE GRANTED AS TO SAME SITE?

Dear Sir:

I am in receipt of your request for an opinion as follows:

REQUEST

"The Department of City Planning has received a petition signed by a number of residents and property owners in the area adjacent to the rock quarry of Chas. L. Harney, Inc. at Sixth Avenue and Locksley. The petition is enclosed herewith for your information. Please return it to us for filing.

"This quarry is in a First Residential District. The petition is in protest to the operation of a rock crushing plant and rock screening machinery, and urges this Department to disapprove as to zoning the application for a permit to construct concrete foundations for a 'Temporary Portable Plant.'

"We interviewed Mr. Harney, in order to ascertain the nature of the operation, and he stated that the machinery is already in place, but is not in operation, pending approval of the permit. We requested him to make a written statement as to the nature of the proposed operation, a copy of which is enclosed herewith. During our conversation with Mr. Harney, he said that operation of the 'screening equipment' will involve crushing of the rock.

"In the past, this type of operation has always been considered here as a Heavy Industrial use, under the provisions of Art. I, Sec. 6, Item 27 of the City Planning Code.

"There is no precedent, as far as we know, for the operation of a rock crushing plant on the site of a quarry in a residential district, as a necessary or usual incident to the excavation and removal of material therefrom. Your opinion is therefore respectfully requested, in order that we may be guided in the present instance and in any future similar cases, should such arise, as to whether the proposed operation is a permitted use under the City Planning Code."

The petition you refer to states:

"We, the undersigned, are residents and property owners in the area adjacent to the rock quarry created by the Chas. L. Harney Company at Sixth Avenue and Locksley (between Kirkham and Lawton Streets). This quarry is situated in a second class residential area, and has been an eyesore and blight to our neighborhood for many years. The Company has used the pretext of 'grading the property to improve it' as an excuse for being permitted to continue the quarrying of rock at this location.

"During the past week high tension wires were strung into the quarry, and elaborate concrete foundations were installed to accommodate a rock crusher. The rock crusher was brought to the site and set up on Thursday, October 13, 1955. Other concrete foundations at the site indicate that other mechanical equipment is due to be installed at this location.

"We were informed by the San Francisco Central Permit Bureau (Mr. Franklin) on October 14, 1955, that the Chas. L. Harney Company has applied for a permit to be allowed to install a 'temporary, portable plant' at this location.

"We wish to hereby vigorously protest the issuance of any permit which will allow the installation of such a rock crushing plant, either temporary or permanent. The quarrying operations have already caused us untold misery and damage to our property. Our homes and gardens are grimy with red rock dust; it is impossible to keep the interiors clean because of the dust; freshly laundered clothes are soiled on the lines; our streets are rutted and gouged by heavy trucks and equipment; our children are endangered on the streets by these heavy vehicles; the health of many of us is impaired by having to breathe the dust and fumes from this unsightly quarry at our front doors.

"We believe that the installation of a rock crusher in this residential area of highly taxed property is a direct violation of the City Zoning Ordinance. We ask that issuance of the aforementioned permit be denied, and if a hearing is to be held on the matter we request that we be notified where and when it is to be held so that we may appear and voice our protests."

The written statement from Mr. Harney states:

"It has been called to our attention that under date of October 14, 1955, a group of residents near our quarry located at Sixth Avenue and Locksley Streets, San Francisco, filed a petition with you objecting to our operations at this location, where we have been working for close on to twenty years. In their petition to you they wish to protest the issuance of a permit for the operation of a temporary rock crushing plant.

"On last Friday one of the officers of our company made a request to the Department of Public Works, Building Inspection Department, for a permit to construct the footings for several pieces of screening equipment. This application was made after our quarry had been visited by a representative of the Building Inspection Department, requesting that we go down and apply for a permit for these foundations. The foundations at that time had already been constructed. They were built of concrete, and they were merely to place our portable equipment upon. We could have used wood timbers and there would not have been any question raised by the Building Inspection Department. Because of the accessibility of concrete, we felt that we would have a more stable working platform and thereby minimize any noise that might come through our operations.

"At the present time we are operating a quarry at this location and have been, as hereinabove referred to, for many years past under the existing ordinances of the City and County of San Francisco. Placing this equipment upon the floor of the quarry is merely incidental to its operation. This operation will mean less noise than what is ordinarily created by working the quarry under the present method.

"Chas. L. Harney, Inc. and its associates are the owners of this quarry, and are presently using the material for the construction of two existing contracts, one with the State Division of Highways and the other with the City and County of San Francisco, in which time is of the essence. By mutual agreement with the department heads of both of the above authorities this group has reduced the working days to complete these contracts approximately ninety days, and this reduction in time was partially based upon the delivery of rock from the Sixth Avenue and Locksley Street location.

"The fact that the area is zoned by the present existing Zoning Ordinance as a second class residential area should not be considered in the matter of this application, because of the fact that under the present City Ordinance the City has granted to Chas. L. Harney, Inc. a right to carry out the operation of an industry in this area, namely, the operation of a quarry. The equipment being used at this location is of the type that is similarly used in a quarry, and can be moved in or out within a twenty-four hour period.

"It is the contention of our corporation that a permit to construct a foundation for a portable structure in this present situation is not called for by the existing City and County ordinance. This is based upon the fact that the controversy is over a piece of portable construction equipment which is similar to a pile driving machine, and/or a portable asphalt plant or a portable concrete mixer, or any other type of construction equipment, including shovels or caterpillars or any other tools incidental to the work.

"If this contention is not in accord with your ideas of this matter, we feel that Chas. L. Harney, Inc. is legally operating an industry within an area zoned as a second class residential district, that the mere construction of foundations that consist of a total of approximately ten yards of concrete which are to be holding a piece of equipment in place, which is incidental to the operation of the quarry, for which the City and County of San Francisco has legally granted a permit.

"Now, for your advice and information in connection with this piece of equipment, we naturally cannot leave it stay at this location any great length of time. It is our estimate that we will have less than two hundred working days of usage out of it at this location, and we will undoubtedly move it away to another location after sixty days and then bring it back again.

"We would like to respectfully impress upon you that any indecision in connection with this matter is already causing us delays, and will delay further the completion of at least two very important road projects for which we have contracts. We earnestly request that you at your very earliest opportunity approve the request of the Building Inspection Department to allow them to issue and grant a building permit to us for the foundations which are constructed at this location.

> "There is one final point which this corporation would like to explain to you, that is, although we have never contended that we were grading this property for any particular purpose, it has always been our contention and still is that we are doing the quarrying operation at this point, but realistically, in effect, we really are preparing the land which, in the future, we believe, will result in some of the most desirable apartment house sites in the City and County of San Francisco."

OPINION

The question posed is whether the operation of the proposed rock screening and crushing plant is a permitted use within a district zoned first or second residential under the City Planning Code. It is my opinion that the City authorities would be acting within their rightful jurisdiction in finding that this plant is not a permitted use in such a district, and in rejecting the application for a permit therefor.

Zoning cannot be employed absolutely to prevent the operation of a quarry (Ex parte Kelso, 147 C. 609; Hadacheck v. Sebastian, 239 U. S. 394), but the owner of a quarry in a residential district can be prevented from treating the product in that place. (Bassett, Zoning, p. 215)

In De Felice v. Zoning Bd. of Appeals, 130 Conn. 156, the property owner operated a commercial sand pit in a district zoned residential as a non-conforming use. Both before and after the enactment of the zoning ordinance, equipment used consisted of hand shovels and other tools, steam and power shovels, one dry classifier, one asphalt plant, power cranes, horse-drawn vehicles, trucks, screens for sifting and grading sand, and other types of sand-extracting equipment exclusive of a wet sand classifier. Thereafter, several concrete footings were constructed to be utilized in the installation of a wet sand classifier, which was mostly of steel, one hundred six feet long, eighty-five feet wide for part of the distance, and forty feet high. The wet sand classifier not only excavated and freed the sand of stones as did the dry classifier, but also washed and sorted it according to size, thus producing a recognized commercial product of enhanced value. This extended new operation was challenged as illegal under the zoning ordinance. The board of zoning appeals so found. The Connecticut Supreme Court held that the board of zoning appeals properly found that this extended operation was a departure from the original non-conforming use

and violated the zoning ordinance. It affirmed this determination by the board of zoning appeals.

I am advised that the equipment in question is not to be employed for the purpose of extracting or severing the rock from its natural formation but rather for the purpose of processing and treating the rock, after it is extracted and severed, by screening and crushing same and thus creating a recognized commercial product of enhanced value.

Article I, Section 3 of the City Planning Code specifies the limited purposes for which property may be used in a first residential district. The operation of a rock screening and crushing plant is not one of the permissible uses.

If the operation of a rock crushing plant is noxious or offensive by reason of the emission of odor, dust, smoke, noise or gas, said operation would properly fall within the classification of a Heavy Industrial Use as provided in Article I, Section 6, Item 27 of the City Planning Code.

No facts have been brought to my attention which would establish the operation of any previous rock crushing operation as a permissible non-conforming use under the provisions of the Planning Code. But assuming that there was some previous operation qualifying as a non-conforming use, the City authorities from whom a permit for operation of the new proposed plant is requested, would, in my opinion, be acting within their rightful jurisdiction in finding it an unwarranted enlargement of the prior non-conforming use and a violation of our zoning ordinance.

Given the objective of zoning to eliminate non-conforming uses, courts throughout the country follow a strict policy against their extension or enlargement (County of San Diego v. McClurken, 37 Cal. 2d 683; Rehfeld v. San Francisco, 218 Cal. 83, 85; 8 McQuillin, Municipal Corps., 3 ed., §25.183, pp. 366-67).

In County of San Diego v. McClurken, supra, the non-conforming use consisted of the utilization of fuel tanks that were moved on heavy skid timbers from place to place all over the property as they were needed and the preliminary grading necessary to be done prior to the making of such moves. One tank had a capacity of 1,200 gallons, another 2,300 gallons, and the largest a capacity of 6,000 gallons. The non-conforming use consisted additionally of the intermittent storage of lumber, scrap metal, and steel beams. The property owners then erected four new tanks with a capacity of 12,000 gallons each, 32 feet high and 8 feet in diameter, permanently located upon a rectangular concrete base 10 feet wide and 54 feet long. The California Supreme Court held that this enlargement of

the non-conforming use constituted, as a matter of law, a violation of the San Diego zoning ordinance. The contrary trial court determination was reversed.

I am advised that until the rock crushing plant in question was erected, intermittent rock crushing was done by means of relatively small mobile equipment but that there were no permanent structures of any kind on the property before or after the effective date of the zoning ordinance. The proposed new plant is to be affixed to a concrete foundation and undoubtedly constitutes an enlargement of any prior operation. Under the authority of *County of San Diego* v. *McClurken*, supra, it is my opinion that even *if* rock crushing were a *permissible* non-conforming use, the City authorities would be warranted in finding that the new rock-crushing operation is an unwarranted enlargement of any prior non-conforming use and not permissible in a district zoned first or second residential.

Respectfully submitted,

DION R. HOLM
City Attorney

JC/GEB

TO: Mr. Paul Oppermann
Director of Planning
100 Larkin Street
San Francisco 2

Enclosure

OPINION NO. 1009

November 2, 1955

SUBJECT: APPLICATION TO TEMPORARY EMPLOYEE OF RETIREMENT AMENDMENT (SEC. 222, PART I, MUNICIPAL CODE), EFFECTIVE SEPTEMBER 14, 1942 ON MILITARY LEAVE AT SUCH TIME; RIGHT TO CREDIT FOR PRIOR SERVICE.

Gentlemen:

This will acknowledge receipt of your request for an opinion as follows:

REQUEST

"Your opinion is requested concerning the status of Charles William Woodruff in the Retirement System. The following data are submitted:

"1. Mr. Woodruff enlisted in the United States Naval Service June 16, 1942, and received an honorable release from the service in the armed forces June 13, 1947.

"2. At the time of his enlistment he was an employee of the city and county. He had entered city-service June 10, 1941 under certification from a civil service list for temporary employment, as a clerk-typist, classification B512, in the Municipal Court, and his employment in that status had continued, uninterrupted by a break of more than one month, up to the date of his enlistment. Prior to the date of his enlistment he did not become a member of the Retirement System, being excluded under the provisions of subsection (b), Section 222, Article 3, Part I of the Municipal Code, as then in effect.

"3. On July 1, 1942, he became subject to certification for permanent employment, as a clerk-typist, classification B512, but, being absent in military service, he was not so certified. After his return from military service, he was certified, on September 4, 1947, for permanent employment in the Health Department, as a clerk-typist B512, a status in which membership in the Retirement System is immediate. Accordingly, the effective date of his membership, standing as presently in the records of the System, is September 4, 1947.

"4. Subsection (b), Section 222 of Article 3, Part I of the Municipal Code was amended effective September

14, 1942, to provide that employees certified from civil service lists for temporary employment who complete six months of city-service, including service rendered after January 1, 1942, uninterrupted by a break of more than one month, should not be prevented under that section from being members.

"In view of the definition of 'continuous service', in subsection (h), Section 200, Article 3, Part I of the Municipal Code, and of the provisions of the first paragraph of Charter Section 161, as from time to time amended, two questions arise:

> "(a) Did the amendment to Section 222, effective September 14, 1942, apply to Mr. Woodruff, in the same manner as if he then was performing duties in the service of the city and county?
>
> "(b) Should he now be credited with prior service, under subdivision (5), subsection (o), Section 200, Article 3, Part I of the Municipal Code, for the time he was absent from city-service while in military service, from June 16, 1942, to September 13, 1942, inclusive.

"You are requested to advise the Retirement Board concerning these two questions."

OPINION

From the facts presented it appears that Charles William Woodroff entered the city-service on June 10, 1941 under a certification for temporary employment. His employment continued uninterrupted by a break of more than one month up to the date of his enlistment in the United States Navy on June 16, 1942.

At the time of Mr. Woodruff's enlistment in the United States Navy (June 16, 1942) he was not a member of the San Francisco City and County Employees' Retirement System, as subsection (b), Section 222, of Article 3, Part I of the San Francisco Municipal Code then expressly excluded employees certified from civil service lists for temporary employment from membership in the System. This section of the Municipal Code was subsequently amended, however, effective September 14, 1942, so as to allow employees certified from civil service lists for temporary employment to become members of the Retirement System, and provided in this connection as follows:

> "Sec. 222. Persons Excluded. The following employees shall not be members of the Retirement System:
>
> . . . . .
>
> "(b) Employees not then already members, certified from Civil Service lists for temporary employment; provided that such employees who complete six (6) months of city service, including service rendered after January 1, 1942, uninterrupted by a break of more than one (1) month, shall not be prevented under this subsection from being members;"

The first question that presents itself, therefore, is whether Mr. Woodruff's membership in the Retirement System should be considered as having commenced on or about September 14, 1942, under the amendment to Section 222 of the Municipal Code, supra.

The first clause or sentence of Section 161 of the Charter, has provided ever since 1935 through the present date that:

> "Continuous service shall be defined by the Board of Supervisors . . . "

Ever since 1937 through the present date the Board of Supervisors has defined "continuous service" in subsection (h) of Section 200, Article 3, Part I, of the San Francisco Municipal Code as follows:

> "(h) 'Continuous service' shall mean uninterrupted city-service, except that discontinuance of city-service from any cause whatever followed by reentrance into city-service within three (3) years from the date of such discontinuance shall not be considered as a break in the continuity of service, and except that any absence from city-service by reason of service in the military or naval forces of the United States in any war in which the United States has engaged or may become engaged shall not be considered as a break in city-service and the period of such absence shall count as city-service; but time during which a person otherwise than because of such service has been or shall be absent, for any reason, from city-service shall not be included in calculating any benefit under the Retirement System or in determining whether a member qualifies for retirement."

Section 395.1(b) of the Military and Veterans Code ever since its first adoption in 1946 through the present date has provided that upon the return and re-entry of a city and county employee to the employment which he left to enter the armed forces, he shall have all of the rights and privileges in, connected with, or arising out of the office or employment which he would have enjoyed if he had not been absent therefrom.

The courts have held that such provisions of the law shall be liberally construed so that veterans may receive their full benefit. In Cunningham v. Hart, 80 Cal. App. 2d 902, the court said as follows:

> "Petitioners claim that the proper interpretation of Section 3.5 of Article XX of the Constitution limits the words 'reinstatement in public employment' merely to a veteran's right to have his old position back, without any right to 'have all the rights and privileges in, connected with, or arising out of the office or employment which he would have enjoyed if he had not been absent therefrom' as provided in section 395.1 of the Military and Veterans Code. In view of the general attitude of the people towards men and women who performed the great patriotic duty of entering the armed services in time of war, and the decisions of the courts liberally interpreting laws concerning the rights and privileges to be granted them because of such service, such an interpretation would be too narrow and constricted. Just to give a returned veteran the same position he had when he left for war, and refuse to place him as nearly as reasonably and feasibly possible in the position he would now be in had he not gone into the armed forces, would be a poor recognition of and reward for the sacrifice he had made for his country. When the public servant returns from service in the armed forces to his former position, under the spirit of the Constitution, the act of the Legislature, the decisions of the courts, and above all, the desires of a grateful citizenry, he is entitled to an immediate opportunity to take an examination to make him eligible for the promotion he would have received had he not left the public service and had he passed the required examination."

In this case here, one of the rights and privileges which Mr. Woodruff would have enjoyed if he had not been so absent from his employment is that of membership in the Retirement System.

It is apparent therefore that if Mr. Woodruff had not been absent from the city-service by reason of military duty, he would have become a member of the Retirement System on or about September 14, 1942. This being so, and the Board of Supervisors under and pursuant to the authority granted by the charter having provided that absence from city-service by reason of service in the naval forces of the United States, at a time when the United States was engaged in war shall not be considered as a break in city-service and the period of such absence shall count as city-service (inclusive of calculating benefits under the Retirement System or in determining whether a member qualifies for retirement), Mr. Woodruff's membership in the Retirement System should be considered as having commenced on or about September 14, 1942. This is the answer to your inquiry lettered "(a)".

The next question that presents itself is whether Mr. Woodruff became entitled to become a member of the Retirement System on July 1, 1942, simply by virtue of the fact that his name was reached on the civil service list for permanent appointment while in military service.

This must be answered in the negative. My predecessor had occasion to answer this very inquiry in his opinion to you dated October 14, 1947, No. 4016, wherein he discussed the applicable charter sections and cases, and concluded that a person in the military service was not entitled to become a member of the Retirement System simply by virtue of the fact that his name was reached on the civil service list--he must wait until he returns and assumes the position involved.

The last inquiry that is here involved is whether Mr. Woodruff should be credited with prior service under subdivision 5, subsection (o), Section 200, Article 3, Part I, of the San Francisco Municipal Code, for the time while he was absent from city-service while in military service from June 16, 1942, to September 13, 1942, inclusive.

Subdivision 5, subsection (o), Section 200 Article 3, Part I of the San Francisco Municipal Code reads in part as follows:

> "(5) Persons who are members under Section 165 of the Charter and who were excluded from membership because of their employment in city-service under certification for temporary service from civil service eligibility lists other than limited tenure lists, shall mean aggregate city-service, regardless of breaks in such service, less

> the first six months thereof, rendered prior to September 14, 1942, while so excluded on account of such employment. As an exception to the provisions contained in Section 243 of this Article, however, service shall be credited under this subdivision (5) only if the member elects, prior to March 31, 1955, or prior to the effective date of his retirement, whichever is earlier, to contribute, and does contribute, in a manner and at times approved by the Retirement Board, an amount equal to contributions determined by applying, to the compensation earned by him in such service, the rate of contribution first applicable to him upon commencement of his membership in the Retirement System . . . . "

This ordinance granting "prior service" credit for prior "temporary" service (i.e., prior to September 14, 1942) was within the power and authority of the Board of Supervisors to enact. (See City Attorney's Opinion dated March 9, 1953, No. 671.)

I have been advised Mr. Woodruff on December 9, 1954, and well within the time allowed, duly exercised the option called for by the above ordinance.

Hence, in answer to your inquiry "(b)", you are advised that Mr. Woodruff is entitled to be credited with "prior service" for the time while he was absent from city-service while in military service from June 16, 1942 to September 13, 1942, inclusive.

You are thus advised in connection with your inquiries as submitted.

Respectfully submitted,

NSW/WB

DION R. HOLM
City Attorney

TO: Retirement Board
City and County of San Francisco
460 McAllister Street
San Francisco 2

Attention: Ira G. Thompson, Secretary

Opinion No. 1010
November 3, 1955

SUBJECT: COUNTY FIRE WARDENS, APPLICATION OF CHAPTER 881, STATUTES OF 1955 (SEC. 24008, GOVERNMENT CODE) TO LOCAL DIVISION OF FIRE PREVENTION AND INVESTIGATION.

Dear Sir:

I am responding to your request for an opinion as follows:

REQUEST

"Enclosed is a copy of Assembly Bill No. 1893, passed by this body on April 26, 1955.

"We are concerned with this legislation and would like an opinion pertaining to the following:

"1- Does it apply in present form to members of this Division?

"2- If it applies - in the event of a misdemeanor being committed, not in our presence, could members of this Division make an arrest?

"3- Would members of this Division have to be sworn in as Peace Officers in order to enforce this Bill?

"4- If it does not apply to members of this Division, what type of legislation should be enacted to make it applicable?

"Your reply will be greatly appreciated."

OPINION

This new state law in general terms, now Section 24008 of the Government Code, states as its primary purpose, "aid in enforcing all laws and ordinances and any rules or regulations adopted by the State Board of Forestry and by the State Fire Marshal relating to fires or to fire prevention and protection."

Settlement of your first question must be resolved in the negative due to the very terms of the law itself designating its application in each county to "a county fire warden and such assistants and deputy fire wardens as it (the Board of Supervisors) may consider necessary." I see no applicability of the law, therefore, to the San Francisco Fire Department, nor to your department thereof, namely, the Fire Prevention and Investigation Division, because your department is unnamed as a recipient of the powers granted by the law.

The remaining question for me to answer then is your question number 4. I take it that what you mainly have reference to is your desire to have the same Peace Officer powers that this new law grants to county wardens and their assistants. Insofar as you may desire to exercise such powers with regard to the enforcement of state fire laws, rules and regulations, I believe they may be bestowed upon your department by appropriate state legislation. However, if what you desire is such powers with respect to the enforcement of local fire laws, rules and regulations, I believe they may either be acquired through a special grant of police power by the Chief of Police under Section 35.9 of the City Charter or through the Board of Supervisors by an appropriate ordinance. This distinction is made under the rule that general state laws may not be made applicable to a purely municipal affair when our own City Charter adequately covers the subject. (See Section 3, City Charter; Kennedy v. Ross, 28 C. 2d 569; West Coast Advertising Company vs. San Francisco, 14 C. 2d 516, 521; Loop Lumber Co. v. Van Loben Sels, 173 C. 228, 232.)

Respectfully submitted,

DION R. HOLM
City Attorney

RJR/WFB

To: Carl F. Kruger, Chief
Division of Fire Prevention
and Investigation
San Francisco Fire Department
2 City Hall
San Francisco 2.

Opinion No. 1011
November 4, 1955

SUBJECT: CONTROLLER, RESPONSIBILITY OF ON RECEIPT OF NOTICE OF ASSIGNMENT OF WAGES BY CITY EMPLOYEES.

Dear Sir:

This will acknowledge receipt of your request for an opinion concerning your responsibility upon receipt of notice of assignment of wages by Marie Rosenkranz, a nurse employed by the City and County of San Francisco.

OPINION

No hard and fast rule can be given on the general question of the employer's responsibility on receipt of notice of assignment of the employee's wages. Each case presents a different problem whose solution depends upon all the particular facts thereof. Consequently, the opinion expressed herein refers to the specific case giving rise to your request, namely, that of the assignment of Marie Rosenkranz to Bradley Finance Company executed in Detroit, Michigan.

In this case the following are the material facts:

On March 8, 1947 Marie Rosenkranz and her husband, Stanley Rosenkranz, of Detroit, Michigan, in consideration of a loan in the sum of $300.00 paid to them by Bradley Finance Company, executed in Michigan an assignment to said Bradley Finance Company of "10% of any salary, wages, commission or other compensation for services which may be or become due me, or either of us, under any present or future contract of employment from any person, firm or corporation until the full sum of said loan, together with charges as aforesaid, is fully paid, . . . " Subsequently Marie Rosenkranz moved to San Francisco where she became employed as a nurse at the San Francisco Hospital. On August 11, 1955 you, as Controller, received a notice of assignment and demand of payment from the assignee.

The facts in this case present the question as to the assignability of wages to be earned in the future under a contract of employment not in existence at the time of the purported assignment.

The question of the assignability of unearned wages, as a right arising out of a contract of employment, is determined by the law of the state of employment. In California, wages to be earned under a contract of employment not then in existence are not assignable and a purported assignment thereof is void.

> Mogul v. Jenkins Bros., 120 N.Y.S. 2d 585; Restatement of the Law of Conflicts of Laws, §348; Cox v. Hughes, 10 C.A. 553; Orkow v. Orkow, 133 C.A. 50; Labor Code, §300; Civil Code, §1045.

Therefore, it is my opinion that the attempted assignment executed by said employee in Michigan is ineffective and invalid as an assignment of her wages due or to become due from the City and County of San Francisco, and neither said assignment nor the notice thereof to you as Controller conferred any rights to the Bradley Finance Company or imposed any legal duty or responsibility on the Controller.

Respectfully submitted,

DION R. HOLM
City Attorney

JJT/GEB

To: Harry D. Ross, Controller
Room 109 City Hall
San Francisco 2.

OPINION NO. 1012

November 4, 1955

SUBJECT: MAY SCHOOL TEACHER WHOSE DATE OF COMPULSORY RETIREMENT HAS PASSED RECEIVE A REFUND OF ACCUMULATED CONTRIBUTIONS IN RETIREMENT SYSTEM IN LIEU OF RETIREMENT ALLOWANCE

Gentlemen:

This will acknowledge receipt of your request for an opinion as follows:

REQUEST

> "A question has arisen as to the status under the Retirement System, of a person who was a member of the System, and whose date of compulsory service retirement has passed. For example, an individual might be a teacher, who attained age 70 or age 65 in 1954-55. Under the provisions of Sections 165 or 165.2, as the case may be, and the provisions of the Education Code, the date of his compulsory retirement would be July 1, 1955. The question at issue is whether he would have the right to elect to withdraw his accumulated contributions in the Retirement System, after the close of June 30, 1955, in lieu of receiving the retirement allowance which the Retirement Law says he is entitled to.
>
> . . .
>
> "The immediate question arises because of a recent adoption of amendments to the State Teachers' Retirement Law, increasing the benefits under that law to the extent which makes it to the interest of teachers in San Francisco, to resign and withdraw their accumulated contributions in this system, and so cease to be entitled to benefits here, and to contribute to the State Teachers' Retirement System sufficiently to establish their membership in full under that system.
>
> . . .
>
> "I should state that the policy and practice under this system has always been that once the date of compulsory retirement arrives, the individual is under retirement, and no longer has a right to change his status. That question often has arisen in connection with persons who have small retirement allowances and who, therefore, would come to the Retirement office and ask for the refund of their contributions even though their compulsory retirement date has passed.
>
> . . .

> "You are requested, therefore, to furnish us with your opinion as to whether an individual whose date of compulsory retirement has passed, can receive a refund of his accumulated contributions in the Retirement System, in lieu of the retirement allowance to which Charter and Municipal Code provisions entitle him."

OPINION

Section 165 of the Charter provides that the retirement of members of the retirement system thereunder

> "...shall be compulsory at the age of seventy years."

Section 227, Article 3, Part I, of the San Francisco Municipal Code provides for a refund of contributions only where the city service of a member is discontinued other than by death or retirement, as follows:

> "Withdrawals. Should the city-service of a member be discontinued, except by death or retirement, he shall be paid not less than six (6) months after the date of discontinuance, such part of his accumulated contributions as he shall demand;..."

Section 165.2(B) of the Charter provides that members of the retirement system thereunder

> "...shall be retired on the first day of the month next following the attainment by them... of the age of sixty-five years."

Section 165.2(F) of the Charter provides for refund of the accumulated contributions (insofar as here applicable) only where the member ceases to be employed as such a member other than by death or retirement, as follows:

> "Should any miscellaneous member cease to be employed as such a member, through any cause other than death or retirement, all of his contributions, with interest credited thereon, shall

> be refunded to him subject to the conditions prescribed by the board of supervisors to cover similar terminations of employment and reemployment..."

Section 13098 of the Education Code provides for retirement at the close of the school year in which compulsory retirement age is reached, as follows:

> "Every certificated permanent employee of any school district which has provided a retirement salary for employees supplementary to the State retirement salary, shall be retired at the close of the school year in which he attains the age of compulsory retirement provided in the teacher retirement plan of the district, if such age is not less than 65 years. Any certificated employee retired under the provisions of this section and who has not completed the requirements for full retirement salary, shall be deemed to have been retired on account of physical disability."

From your statement of facts, I gather that the retirement system has always considered the above provision of the Education Code as governing, insofar as the San Francisco teachers are concerned. Hence, under the provisions of Section 165 or 165.2 of the Charter (as the case may be) and the provision of the Education Code, the date of compulsory retirement for a teacher attaining the age of 70 or 65 (supra) in the fiscal year 1954-55 would be July 1, 1955. You ask whether such a teacher would have the right to elect to withdraw his contributions in the San Francisco retirement system after the close of June 30, 1955, in lieu of receiving a retirement allowance.

You state that the policy and practice under the system has always been that once the date of compulsory retirement has arrived the individual is under retirement, and no longer has a right to change his status. This is a correct interpretation of the law.

The compulsory provisions of the Retirement Law are mandatory and self-executing, providing as they do that "retirement shall be compulsory at the age of seventy years" under Section 165 of the Charter, and "members shall be retired . . . following the attainment of the age of sixty-five years" under Section 165.2(B) of the Charter. This interpretation is

fortified by the fact that a withdrawal of contributions is only allowed should a member's service be discontinued through any cause other than death or retirement (supra). It is thus to be noted that while a member has a right to withdraw his funds prior to his reaching mandatory retirement age, upon his reaching the age of mandatory retirement he no longer is given any such election to withdraw his contributions or take a retirement allowance -- his only right of election is that of taking an optional modification of allowance under the provisions of Section 257, Article 3, Part I, of the San Francisco Municipal Code in lieu of the maximum allowance otherwise payable.

Thus we find that under the provisions of Section 165 of the Charter as supplemented by Section 252, Article 3, Part I of the San Francisco Municipal Code, and under the provisions of Section 165.2(b) of the Charter, it is provided that upon retirement for service a member shall receive a retirement allowance, the amount of which is therein spelled out. The only option thereafter remaining appears in Section 257 of the Municipal Code, (supra), which provides that until the first payment on account of any retirement allowance is made (subject to a condition not here pertinent) the retired person

> "...may elect to receive the actuarial equivalent of his retirement allowance as of the date of retirement in a lesser retirement allowance payable throughout his life..."

under the options therein set forth.

This same general question was heretofore presented to my predecessor, JOHN J. O'TOOLE, who rendered his opinion to you dated March 20, 1945, No. 3649, to which you are referred, and his conclusions therein are identical with those at which I have arrived herein.

You are, therefore, advised that an individual whose date of compulsory retirement has passed (such as after June 30, 1955, in the case of a teacher who attained the age of 70 under Section 165 of the Charter or the age of 65 under Section 165.2 of the Charter in the fiscal year 1954-55) has no option to elect to withdraw his accumulated contributions from the retirement system in lieu of receiving the retirement allowance to which the Charter and Municipal Code provisions entitle him.

Respectfully submitted,

DION R. HOLM
City Attorney

NSW/WFB

TO: Retirement Board, 460 McAllister Street, San Francisco 2
Attention: Ralph R. Nelson, Consulting Attorney

OPINION NO. 1013
November 7, 1955

SUBJECT: TEMPORARY REMOVAL OF STOP SIGNS TO DETERMINE EFFECTIVENESS, AUTHORITY FOR TO POLICE COMMISSION.

Gentlemen:

The office is in receipt of your request for opinion, as follows:

REQUEST

> "I would appreciate it if you would advise me as to what steps would have to be taken to comply with the suggestion of Captain Meyer, that the Police Commission be given authority to temporarily remove stop signs for a designated period of time to determine the effectiveness of said signs."

OPINION

Your request presents the following questions:

1) May the Board of Supervisors legislate with regard to the creation of through highways by the placement of stop signs?

2) May the Board of Supervisors create power in the Police Commission for the designation of through highways by the placement of stop signs?

3) May the Police Commission be given the power to designate through highways for a temporary period by the placement of temporary stop signs?

My answers to all three questions are in the affirmative.

The law as set out in the California Vehicle Code, Section 459, sets out the grant of power by the State Legislature to local authority dealing with the matter of traffic control.

Vehicle Code Section 459 provides:

> "The provisions of this division shall not prevent local authorities within the reasonable

> exercise of the police power from adopting rules and regulations by ordinance or resolution on the following matters:
>
> * * * *
>
> (g) Designating any highway as a through highway and requiring that all vehicles stop before entering or crossing the same or designating any intersection as a stop intersection and requiring all vehicles to stop at one or more entrances to such intersection."

The Board of Supervisors having the power to designate a through highway and stop intersection by the posting of the appropriate stop signs may enact a general law setting forth the unlawfulness of a driver who fails to stop at such designated stops where the power to so designate such stops is reposed in the Police Commission by further ordinance passed by the Board of Supervisors. In so providing, the Board of Supervisors would in fact be legislating as provided for in Section 459 of the Vehicle Code. The functions of the Police Commission under appropriate legislation would not be legislative but rather administrative. See Borum v. Graham, 4 C.A. 2d 331; Mecchi v. Lyons Van & Storage Co., 38 C.A. 2d 674, 682.

Since the Board of Supervisors by appropriate legislation can give the power of designation through highways and stop intersections to the Police Commission, the Police Commission might then properly remove stop signs so as to withdraw the designation of a through highway or stop intersection. As a result the Police Commission under such ordinances might temporarily abolish such through highways and stop intersections by the removal of stop signs in order to determine the effectiveness of said signs.

You are advised accordingly.

Respectfully submitted,

DION R. HOLM
City Attorney

WEM/DJK

TO: John J. Ferdon
Supervisor
235 City Hall
San Francisco 2

Opinion No. 1014
November 7, 1955

SUBJECT: POWER TO ENACT ORDINANCE UNDER VEHICLE CODE SECTION 595.1 TO TOW AWAY AUTOMOBILES ILLEGALLY PARKED ON GRADES

Gentlemen:

This office is in receipt of your request for opinion, as follows:

REQUEST

> "I would appreciate learning from you whether or not the provisions of Section 595.1 of the Vehicle Code of the State of California would permit the passing of a local ordinance which would give us the police power to tow automobiles illegally parked in grades which exceed three percent within any business or residence district without blocking the wheels of said vehicle by turning them against the curb or by other means.
>
> "If this is not possible, is there any other section in the Vehicle Code which would give us the above described power?"

OPINION

Section 595.1 of the Vehicle Code of the State of California provides as follows:

> "Local Regulation of Parking on Hills. The provisions of this division shall not prevent local authorities, within the reasonable exercise of their police powers from adopting rules and regulations by ordinance or resolution providing that no person driving, or in control of, or in charge of, a motor vehicle shall permit it to stand on any highway unattended when upon any grade exceeding 3 per cent within any business or residence district without blocking the wheels of said vehicle by turning them against the curb or by other means."

It is my opinion that the authority for police officers to tow away certain vehicles must find its source in Vehicle Code Sections 585, 585.1, 585.2, 585.3, 585.4 and 585.5. It is quite evident from a reading of these sections that the legislature intended them to govern all situations under which tow aways might be undertaken.

Vehicle Code Section 585 provides as follows:

> "(a) It is unlawful for any peace officer or any unauthorized person to remove any unattended vehicle from a highway to a garage or from said highway to any other place, except as provided in this code."

Section 595.1 of the Vehicle Code is simply enabling legislation by which local bodies might properly regulate vehicles parked on grades. It must be interpreted in the light of other sections of the Vehicle Code, specifically in the light of the limitations contained in Vehicle Code Section 585.

It is my impression that to provide for towing away of vehicles illegally parked on grades exceeding 3 per cent would require an amendment to the Vehicle Code of the State of California.

Respectfully submitted,

DION R. HOLM
City Attorney

WEM/TJB

To: Police Department
Hall of Justice
Kearny and Washington Streets
San Francisco, California

Attention: George M. Healy, Acting
Chief of Police.

OPINION NO. 1015
November 10, 1955

SUBJECT: ONE FOR ONE GARAGE SPACE PROPOSED ORDINANCE; VARIANCE PROVISIONS, APPEAL TO BOARD OF SUPERVISORS, LEGALITY OF WHEN NEW COMPREHENSIVE ZONING ORDINANCE BECOMES EFFECTIVE AS PROVIDED IN CHARTER SECTION 117.

Dear Sir:

Your question stated in your request is as follows:

REQUEST

"It is our understanding that the one for one parking ordinance now in committee of the Board of Supervisors may be in conflict with the charter provision providing that when the new zoning ordinance is adopted into law by the Board of Supervisors, all appeals shall be taken to the Board of Permit Appeals rather than the Board of Supervisors.

"Will you please check into this matter, and advise us, as president Henning and the rest of our board members are desirous of your opinion."

OPINION

Settlement of your question must be resolved in the negative.

Section 117.3 of the Charter to which your inquiry has reference is made operative and effective as to variance appeals by Section 117 only after a new comprehensive zoning ordinance has been enacted into law. The one for one parking space legislation now pending before the Board of Supervisors may not be classified as such an ordinance. It is not only interim in character, but limited rather than comprehensive in scope. I am also mindful of the fact that it is not our prerogative now to assume or contemplate that this presently proposed legislation will necessarily become a part without change of any new comprehensive zoning ordinance that may be adopted in the future.

You are therefore advised that the proposed one for one parking ordinance now being considered by the Board of Supervisors empowering it rather than the Board of Permit

Appeals with jurisdiction over variance appeals as to this particular legislation is not in conflict with the Charter. Prospecting as to whether conflict will develop in the future through such a provision being carried over into a new comprehensive zoning ordinance is not in order at this time.

Respectfully submitted,

DION R. HOLM
City Attorney

TO: Board of Permit Appeals
Room 227 City Hall
San Francisco 2

Attention J. Edwin Mattox, Secretary

RJR/TJB

Opinion No. 1016
November 10, 1955

SUBJECT: HEALTH SERVICE SYSTEM, DUTY TO MAKE AVAILABLE FOR CONTROLLER'S AUDIT SUCH RECORDS, INCLUDING DOCTOR BILLS, AS ARE REQUIRED TO AUDIT THE PAYMENTS OF MEDICAL BENEFITS AGAINST THE AUTHORIZED FEE SCHEDULE; CHARTER SECTION 172.1

Dear Sir:

I have your request for opinion as follows:

REQUEST

> "This office is engaged in an audit of the books and records of the Health Service System.
>
> "Is the System, at our request, obliged to make available to us such records, including doctors' bills, as are required to audit the payments of medical benefits against the authorized fee schedule?
>
> "We are informed that the System has adopted a policy that its medical records are confidential."

OPINION

It is my opinion that the Health Service System is obliged to make such records available to you.

Charter §172.1, subd. 4, states that "the controller shall have and exercise the accounting and auditing powers over the funds of the system which are vested in him by this charter with respect to all other municipal boards, officers and commissions." Charter §66 states that "The controller shall audit the accounts of all boards, officers and employees of the city and county charged in any manner with the custody, collection, or disbursement of funds." Charter §21 states that the controller may "examine the books, papers, records and accounts of, and inquire into matters affecting the conduct of any department of office of the city and county."

You are therefore advised that all of the records of the Health Service System, including medical records, are subject to your audit and examination.

Respectfully submitted,

DION R. HOLM
City Attorney

GEB/WFB

To: Harry D. Ross, Controller
109 City Hall
San Francisco 2.

OPINION NO. 1017

November 15, 1955

SUBJECT: ROOF-TOP SIGN IN VIOLATION OF COVENANT, POWER OF BOARD OF PERMIT APPEALS AND CITY PLANNING COMMISSION IN RELATION THERETO; MODIFICATION OF STIPULATIONS UNDER PLANNING CODE SECTION 47.1.

Dear Sir:

I am in receipt of your request for opinion concerning an application for a new structural roof-top sign in the Stonestown area. To answer your questions, it will be necessary to summarize your request and set forth some of the facts pertinent to the problem.

An application was presented to the Central Permit Bureau for a permit to construct a structural roof-top sign, approximately 11 feet by 36 feet in size, on one of the buildings in Stonestown.

The proposed sign would be constructed on a building located in an area which, in 1950, the Commission reclassified from a First Residential, Second Residential and Commercial to a Commercial district by Resolution No. 3731. The reclassification was specifically made contingent upon the observance of certain stipulations contained in a covenant executed pursuant to and made a part of said Resolution. The covenant was between the City and the corporation developing the area and specifically bound its successors in interest. The applicant for the sign permit herein being considered is one of those successors and there is no claim made that he is not bound by the terms of the covenant. The stipulations contained in said covenant, which are pertinent to this opinion read as follows:

> "1. The development of the above described property shall be carried out as a whole, and the general character of the layout of streets, blocks, buildings and uses shall conform to the preliminary plan submitted by covenantors, which plan is identified as 'MASTER SITE PLAN FOR THE DEVELOPMENT OF STONESTOWN COMMERCIAL AREA' . . . Said plan is hereby made a part of these stipulations . . .
>
> "2. The covenantors shall cause to be prepared and shall submit to the Planning Commission, for approval, a final site plan for the development of the said property, conforming substantially to the aforesaid preliminary plan and to these stipulations in their entirety, said final plan to show:
>
> * * * * * * * * *
>
> "(b) Sections through project showing character, location and heights of buildings and signs.
>
> * * * * * * * * *

> "3. The filing of such final site plan with the Planning Commission shall be necessary before any actual construction is begun, and such construction shall conform in detail to said final site plan.
>
> * * * * * * * * *
>
> "7. No commercial structure shall have a height such as to extend above a horizontal plane passing through a point 48 feet above the elevation of the center line of Nineteenth Avenue at a point due east of the center of the side of the proposed structure nearest to Nineteenth Avenue. Provided, however, that minor superstructures such as pent houses, shall be excluded from such limitation and that one roof-top sign on the Emporium Building and one mast-type sign, on the theater as shown on the approved site plan may project 25 feet above the 48 foot height herein provided." (Emphasis added.)

I have been informed by your office that the proposed sign will not be higher than the 48 foot restriction imposed by Section 7.

The cross sections in the preliminary plan and final site plan which were approved by the Commission do not indicate the roof-top sign for which a permit is now being sought. The two signs permitted by Section 7 are plainly shown on the plans.

When the permit application was referred to the City Planning Commission, it was disapproved on the ground that the sign would violate the stipulations of the covenant upon which the reclassification was made contingent, and, therefore, it could not grant approval.

Accordingly, the Central Permit Bureau denied the permit, and the applicant appealed to the Board of Permit Appeals without first applying for a modification or waiver of stipulations, as permitted by Section 47.1 of the City Planning Code.

At the hearing before the Board, a representative of your department appeared, but did not present in evidence the covenant or plans. The Board ordered the permit approved. A rehearing has been granted by the Board of Permit Appeals.

Your request for opinion sets out three problems:

(1) Does the Board of Permit Appeals have jurisdiction to consider the appeal?

(2) Does the sign violate the stipulations?

(3) Is the proper procedure for the applicant to apply for a modification or waiver of the stipulations pursuant to Section 47.1 of the Planning Code?

OPINION

Section 39 of the Charter provides that "any applicant for a permit or license who is denied such a permit or license by the department authorized to issue same . . . may appeal to the Board of Permit Appeals."

The department "authorized to issue" the permit in the instant case was the Central Permit Bureau, although the application was referred to various interested city departments for their approval or disapproval. See Public Works Code, §§ 1-5, Article 1, Chapter X, Part II, of San Francisco Municipal Code. The permit in this case, though disapproved by the City Planning Commission, was actually denied by the Central Permit Bureau, the department authorized to issue such a permit. The appeal was taken from the denial of the permit and not from any action by the Planning Commission. Charter Section 39 is specific that when a permit is denied by a department authorized to issue it, the Central Permit Bureau in this case, an appeal may be taken to the Board of Permit Appeals.

Accordingly, in answer to Question 1, I conclude that the Board of Permit Appeals has jurisdiction of the appeal.

The next question presented by you is whether the proposed sign will violate the covenant. You point out that this is a matter in which the Commission had no discretion, since the stipulations would be violated and the Board of Permit Appeals has no discretion to permit a violation of the covenant. It is true that it has been held that the discretionary power of the Board of Permit Appeals does not extend so far as to permit it to allow an express violation of a section of the Building Code (Ratto v. City and County of San Francisco, San Francisco Superior Court Case No. 403974; S.F. City Attorney's Opinion No. 3927 (March 17, 1947).

In my opinion, the same is true as to the violation of a covenant entered into pursuant to Section 47 of the City Planning Code. However, in the instant case, counsel for the applicant has taken the position that the sign is permitted under the covenant and does not violate the stipulations. Therefore, the ultimate question resolves itself to the interpretation of the covenant and its conditions.

I have examined the stipulations involved and it is my opinion that the contemplated sign would violate the covenant and the conditions upon which the reclassification was granted.

Other stipulations not pertinent here substantiate that the area was to be developed according to and conform to the Master Site Plan, for the stipulations encompass layout of streets; general character of blocks, buildings, uses; height, location, character and

spacing of buildings; landscaping; flow of vehicular traffic; uses; parking; width and design of streets, and other specifications.

The preliminary plan and final site plan which were approved by the Commission do not indicate the roof-top sign now being considered. The two signs permitted by Section 7 are plainly shown on the plan.

Section 1 specifically states that the development of the area and "the general character of the . . . buildings" shall conform to the Master Site Plan. Section 2 specifically requires that final site plan, with which any construction must conform in detail (See 3), shall show the "location and heights of buildings and signs." Certainly the necessary conclusion from this language, and the general plan of the development, is that regulation of roof-top signs, which could conceivably change the entire profile and atmosphere of the area, was contemplated and that unless such signs were included in the plans, to which construction must adhere in detail, they are not permitted under the stipulations. This conclusion is buttressed by the specific exception in Section 7 of the only two signs permitted under the stipulation and appearing in the plans.

Therefore, in answer to your second question, it is my opinion that the sign is not permitted by the stipulations as they now exist, and, on that basis, the denial of the permit should be affirmed.

In answer to Question 3, it is sufficient to state that though applicant could have petitioned for a waiver or modification of the stipulation under Section 47.1 of the Planning Code, he was not compelled to do so. This was but another remedy open to him, and it was consistent with his position that the sign did not violate the stipulations not to petition for a modification under Section 47.1.

You are so advised.

Respectfully submitted,

TO: MR. PAUL OPPERMANN DION R. HOLM, City Attorney.
Director of Planning
Department of City Planning
100 Larkin Street
San Francisco 2, California

RS/BJW

Opinion No. 1018
Nov. 16, 1955

SUBJECT: WAR MEMORIAL BOARD OF TRUSTEES, PERSONAL LIABILITY OF MEMBERS ARISING FROM ACCIDENTS ON WAR MEMORIAL PREMISES; LIABILITY OF PUBLIC OFFICERS FOR NEGLIGENCE, NON-PERFORMANCE OR NEGLIGENT PERFORMANCE OF MINISTERIAL DUTIES; TORT LIABILITY OF PUBLIC OFFICERS; GOVERNMENT CODE SECTIONS 1953, 1954, and 53051.

Gentlemen:

This will acknowledge receipt of your request for an opinion regarding the personal liability of members of the War Memorial Board of Trustees arising out of accidents and other like type of incidents occurring in and about the War Memorial premises.

REQUEST

> "At the last regular meeting of the War Memorial Board of Trustees, there was considerable discussion relative to the personal liability of members of the Board of Trustees insofar as accidents and other like type of incidents occurring in and about the War Memorial premises.
>
> "The Board instructed me to write to the City Attorney and secure an opinion as to the personal liabilities of the individual members of this Board insofar as the operation of the War Memorial buildings and grounds are involved. An early reply will be appreciated."

OPINION

Naturally, the question of the liability of municipal officers for their tortious conduct is a very broad field, and it is not practical to explore all of the ramifications of this problem. I trust that a brief resume of the general law is at present all that is required.

In general, municipal officers are not liable in private suit for acts done with care in the honest performance of corporate or governmental duties. Fernelius v. Pierce, 22 Cal. 2d 226, 138 P. 2d 12; Bower v. Davis, 13 C.A. 2d 678, 57 P. 2d 574; 4 McQuillin, Municipal Corporations (3d ed.) §12.208. Moreover, a municipal officer in the performance of discretionary duties is not liable civilly therefor. Taylor v. Manson, 9 C.A. 382, 99 P. 410. However, the rule is otherwise when the public officer is acting entirely outside the scope of his office whereby the City or individuals suffer damages. Mock v. Santa Rosa, 126 Cal. 330, 58 P. 826; Collins v. Jones, 131 C.A. 747, 22 P. 2d 39; Appier v. Hayes, 51 C.A.2d 111, 124 P. 2d 125; White v. Towers, 37 Cal. 2d 727, 235 P. 2d 209.

Conversely, it should be noted in discussing the personal liability of the Board members for accidents and other like type of incidents occurring in and about the premises of the War Memorial, that there is no personal liability for negligence where the officer is acting in the scope of his office, and such officer is vested with discretionary powers and is acting within the scope of his authority. Under these circumstances he is not liable for an error in judgment unless guilty of corruption or wilful violation of the laws; in other words, he is not liable for an honest mistake. *Osburn* v. *Stone*, 170 Cal 480, 150 P. 367, 372; 4 *McQuillin, Municipal Corporations* (3d ed.) §12.209, §12.211.

Where, however, the act is a ministerial one, public officers are personally liable for their negligence. *Wolfsen* v. *Wheeler*, 130 C.A. 475, 19 P. 2d 1004; *Oppenheimer* v. *Los Angeles*, 104 C.A. 2d 545, 232 P. 2d 26; *Oppenheimer* v. *Los Angeles*, 104 C.A. 2d 551, 232 P. 2d 30; *Livezey* v. *Rogers*, 31 C.A. 2d 412, 88 Pac. 2d 169.

Personal liability also attaches through *failure* to perform a ministerial duty. *People* v. *Standard Accident Ins. Co*., 42 Cal.App. 2d 409, 108 P. 2d 923.

The distinction between ministerial acts and discretionary acts is as follows: Duties are ministerial which unqualifiedly require the doing of a certain thing. To the extent that performance is unqualifiedly required, it is not discretionary even though the manner of performance may be discretionary. *Ham* v. *County of Los Angeles*, 46 C.A. 148, 189 P. 462; 21 *Cal*. *Jur*., *Public Officers*, §89.

In general, there are two broad avenues of liability arising from accidents and like incidents on the premises of the War Memorial: (1) Accidents arising out of dangerous and defective conditions of public property (Government Code, §53051); and (2) Accidents arising out of the negligence of subordinates or employees, as, for example, an elevator operator negligently closing the doors on a passenger.

Before any personal liability can attach under the cases falling within subdivision (1), the following requirements of Section 1953 of the Government Code must be met.

> "No officer of the State or of any district, county, or city is liable for any damage or injury to any person or property resulting from the defective or dangerous condition of any public property, unless all of the following first appear:
>
> "(a) /Direct and proximate result./ The injury sustained was the direct and proximate result of such defective or dangerous condition.

> "(b) /Notice of defective or dangerous condition./ The officer had notice of such defective or dangerous condition or such defective or dangerous condition was directly attributable to work done by him, or under his direction, in a negligent, careless or unworkmanlike manner.
>
> "(c) /Authority, duty and availability of funds to remedy condition./ He had authority and it was his duty to remedy such condition at the expense of the State or of a political subdivision thereof and that funds for that purpose were immediately available to him.
>
> "(d) /Failure to remedy condition or give warning./ Within a reasonable time after receiving such notice and being able to remedy such condition, he failed so to do, or failed to take reasonable steps to give adequate warning of such condition.
>
> "(e) /Careful use of property and due care to avoid danger./ The damage or injury was sustained while such public property was being carefully used, and due care was being exercised to avoid the danger due to such condition."

With regard to the cases falling within subdivision (2), the general rule is that a public officer is not liable for the acts of a subordinate or employee unless he directs the performance of the act complained of or personally cooperates in it. Fernelius v. Pierce, 22 Cal. 2d 226, 138 P. 2d 12; Oppenheimer v. Los Angeles, 104 C.A. 2d 545, 232 P. 2d 26; 4 McQuillin, Municipal Corporations, 3d ed., §12.226. In this respect, the rule of respondeat superior does not apply as between a public official and his subordinates, since each are agents of the municipality. Hilton v. Oliver, 204 Cal. 535, 269 Pac. 425; O'Brien v. Olson, 42 C.A. 2d 449, 109 P. 2d 8.

With respect to liability of public officers for the negligence of appointees or employees, section 1954 of the Government Code restricts liability as follows:

> "No member of any board is liable for the negligent act or omission of any appointee or employee appointed or employed by him in his official capacity, whether the appointment or employment was made singly or in conjunction with other members of the board, unless the member or members of the board making the appointment or employment either:

> "(a) [Knowledge or notice of inefficiency or incompetency.] Knew or had notice that the person appointed or employed was inefficient and incompetent to perform or render the service or services for which he was appointed or employed.
>
> "(b) [Retention after knowledge or notice.] Retained such inefficient or incompetent person after knowledge or notice of such inefficiency or incompetency."

In conclusion it should be noted that we are informed that public liability insurance is already in force covering the premises of the War Memorial. Insofar as such insurance protects the city in discharging any judgments or settling and compromising any suits or claims arising out of accidents or other like incidents occurring on the premises, the result should be to discharge by operation of law the members of the War Memorial Board of Trustees. However, if the insurance policies do not so specifically provide, they should expressly set forth that they insure not only the City and County of San Francisco, its officers and employees, but, specifically the members of the War Memorial Board of Trustees. This express designation of coverage should not occasion any added cost in premium.

You are advised accordingly.

Respectfully submitted,

DION R. HOLM
City Attorney

GPA/BJW

TO: BOARD OF TRUSTEES
War Memorial
Veterans Building
San Francisco 2
Attention: Mr. Edward Sharkey,
Managing Director.

OPINION NO. 1019

November 17, 1955

SUBJECT: AUTHORITY OF CIVIL SERVICE COMMISSION TO RE-RATE EXAMINATION PAPERS AFTER POSTING OF TENTATIVE LIST; SECTION 147.1 OF THE CHARTER REVIEWED; RULE 12 CIVIL SERVICE COMMISSION DISTINGUISHED.

Gentlemen:

This office is in receipt of your request for opinion as follows:

REQUEST

> "May we direct your attention to the provisions of Section 147.1 of the Charter under which lists of eligibles resulting from examinations shall be posted for two weeks, during which time all examination papers, questions and answers, and all marks and grades in such examination shall be open to public inspection and the Civil Service Commission is given power to correct within a period of sixty days any error which in the judgment of the Civil Service Commission may have occurred in the rating of any participant in such examination. Please also refer to Section 141 which empowers the Civil Service Commission to adopt rules to carry out the civil service provisions of the charter and such rules, except as otherwise provided by charter, shall govern, among other activities, the administration of examinations.
>
> "Pursuant thereto the Civil Service Commission has adopted Rule 12, to which we invite your attention, to provide for orderly inspection, review and copying of examination papers by the public (non-participants), for review by participants of their own papers, and for review by participants of the papers of other participants and for the filing of protests. These inspections are provided under Sections 2(b) and 3 of Rule 12, during the two weeks after the posting of the list of eligibles. Section 2(a) provides for immediate review by a participant of his own papers if he fails the written test and thereby fails to qualify to participate in subsequent parts of the same examination. These inspections are for the purpose of assuring all parties that the papers of candidates have been correctly rated.

"Please note also Section 1 of Rule 12 which provides for inspection (not copying) by participants (not non-participants) of tentative rating keys immediately following the administration of the written test and prior to the rating of the papers. If any protests concerning the propriety and correctness of the tentative rating key are filed during this rating key inspection period, the protests are reviewed and considered and any corrections warranted by this review are ordered made in the rating key. The purpose of this inspection of the tentative rating key is to validate the key prior to the use of the key in scoring papers and before the grades of participants are known.

"Under our Rule 41 requests for reconsideration of action by the Civil Service Commission on protests on rating keys may be filed within one week. Thereafter the Commission adopts the rating key as the official and correct answers to the questions asked in the examination and the papers of all participants are rated in accordance with the official rating key. Once the official rating key is adopted and the papers rated, no further protests concerning the propriety or correctness of the rating key will be considered.

"The security of examination procedures and the maintenance of confidence in the administration of these procedures is of supreme importance. The necessity for validating the rating key before the answers given by participants are known is absolute and not debatable.

"As we see it, Section 1 of Rule 12 grants to participants a privilege which is not granted by Section 147.1 of the Charter, i.e. the inspection of rating keys and this rating key inspection occurs prior to the scoring of examination papers. The rule (Section 1) prohibits further protests concerning the rating key after the examination is scored. On the other hand Sections 2(a), 2(b) and 3 of Rule 12 carry out the charter requirement that all examination papers of participants, all of the questions and the answers of participants and all the marks and grades given participants may be inspected during the two weeks after a list is posted and thus the public and participants are able to assure themselves that each paper has been correctly marked and graded in accord with the approved and uniform rating key.

> "Will you be good enough to advise if in your opinion Section 1 of Rule 12 is valid in view of the provisions of Section 147.1 of the Charter."

OPINION

The basic problem presented in your request covers the interpretation of the language in Section 147.1 in regard to the re-rating of examinations after the posting of the tentative list and an analysis of Rule 12 of the Rules of the Civil Service Commission to determine whether there is any conflict therein. Since I will be discussing both the Charter Section and the Rule throughout this opinion I am setting them forth in full at the beginning of this opinion.

Section 147.1 of the Charter reads as follows:

> "After the civil service commission has prepared and published or posted a list of eligibles, arranged in order of relative excellence, as the result of any examination held by said commission, said list shall not be finally approved for two weeks after the date of the publication or posting of said list, during which time all examination papers, questions and answers, and all marks and grades given on any test given in said examination shall be open to public inspection and copying by any citizen, providing that the identity of the examiner giving any mark or grade in an oral test shall not be disclosed; and provided further that the commission may require the payment of a fee of not more than one dollar ($1) for the inspection of all of the papers relating to the examination of any one person participating in said examination; and provided further that a participant may examine his own examination papers without charge. The civil service commission shall have power to correct any error which in its judgment may have occurred in the rating of any participant in said examination, and to alter said published or posted list of eligibles and to make changes accordingly therein which in the opinion of said commission may be justified by any re-examination of said papers, questions, answers, marks or grades given in said examination; provided that said changes shall be made within a period of not more than sixty (60) days after the date of the publication or posting of said list."

Rule 12 of the Civil Service Commission reads as follows:

> "RULE 12. INSPECTION OF RATING KEYS AND CIVIL SERVICE EXAMINATION PAPERS

"Section 1. INSPECTION OF RATING KEYS: Prior to the rating of the examination papers, the questions asked in the written examination and the rating keys answers will be available for three days, not including Saturdays, Sundays or Holidays, for inspection by participants in the examination. Unless special permission of the Personnel Director is obtained, participants shall not be allowed more than one inspection of the rating key. The time allowed for such rating key inspection may be extended or curtailed if in the judgment of the Commission or the Personnel Director and Secretary, the needs of the service or the number of participants warrants. The examination papers of the applicants will not be available for inspection during the rating key inspection period. The purpose of this inspection of the rating key answers is to correct any errors in the rating key answers or any of the questions asked in the examination that may be ambiguously or incorrectly phrased; therefore, protests by participants regarding the questions or the rating key answers must be filed in writing during this rating key inspection period. Following the close of the three-day inspection period the rating key will be officially adopted by the Commission provided no protests have been filed. If any protests have been filed against the rating key within the three-day inspection period, the questions protested and the key answers shall be immediately available to participants for an additional one-day period, Saturdays, Sundays and Holidays excepted, immediately following the three-day inspection period, during which time the Commission will accept arguments supported by authorities which uphold the key answers. During this period the Commission may refer the questions and rating key answers to authorities for checking as to incorrect answers or ambiguously or incorrectly phrased questions. Following the close of the rating key inspection period, the final rating key will be officially adopted by the Commission. Protests made after the rating key has been officially adopted by the Civil Service Commission will not be considered.

"Section 2(a). IMMEDIATE INSPECTION OF OWN PAPERS PRIOR TO COMPLETION OF EXAMINATION BY PARTICIPANTS FAILING IN WRITTEN PART OF EXAMINATION: Where there are several parts in the examination, and participants failing in the written examination are excluded from the remainder of the examination, such participants shall be immediately notified of their failure. The examination papers of such participants shall be available for two days, not including Saturdays, Sundays or Holidays, for inspection by such participants, and protests on the written portion of the examination at

this time must be made within the two-day inspection period on forms provided by the Civil Service Commission. Protests made at this time regarding the rating key will not be considered by the Civil Service Commission. Participants notified of their failure, whose examination status is not changed through subsequent Commission action will receive no further notification from the Commission.

"Section 2(b). INSPECTION OF OWN EXAMINATION PAPERS BY PARTICIPANTS: After the papers of an examination are rated and a tentative list of eligibles prepared, the said tentative list of eligibles shall be posted in the offices of the Civil Service Commission for a period of two weeks, during which time participants in the examination may inspect their own examination papers under the supervision of monitors employed by the Civil Service Commission. The examination papers of a participant are hereby defined to consist of the application filed by the participant and the questions and answers and all marks and grades relating to the examination of that particular participant, except that the identity of the oral examiners shall not be a part of such record. Protests by participants in regard to their ratings must be filed with the Civil Service Commission on forms provided by the Civil Service Commission within the two-week inspection period, provided that if the last day of said two-week period falls on a holiday, the period shall be extended one day. Protests made at this time regarding the rating key will not be considered by the Civil Service Commission.

"Section 3. INSPECTION BY PARTICIPANTS OF THE PAPERS OF OTHER PARTICIPANTS OR INSPECTION OF PAPERS BY NON-PARTICIPANTS: During the inspection period provided under Section 2(b) of this rule, any citizen may inspect and copy the examination paper of any participant in the examination as provided in Section 2(b) hereof, or any participant may inspect and copy the examination paper of any other participant in such examination, provided, however, that a fee of $1.00 shall be charged and collected for the inspection of each examination paper inspected under the provisions of this section. Protests by persons inspecting examination papers under the provisions of this section must be filed with the Civil Service Commission on forms provided by the Civil Service Commission within the two-week inspection period. Protests regarding the rating key made at this time will not be considered by the Civil Service Commission.

> "Section 4. INSPECTION BEYOND TIME LIMITS: Inspection of examination papers beyond the time limits provided in Section 1, 2, and 3 of this rule shall not be allowed except with the special permission of the Personnel Director and Secretary or the Civil Service Commission. Any appeal to the Commission from a denial of inspection by the Personnel Director and Secretary shall set forth in writing detailed reasons for such request."

Section 147.1 actually can be divided into two complete and distinct subjects. First it establishes the unequivocal right of the participants and the general public upon the payment of the fee to publicly inspect and copy the questions and answers contained in an examination. This inspection is permitted after the posting of what is generally referred to as a tentative list of eligibles. The second portion of Section 147.1 gives a discretionary power to the Civil Service Commission to correct any error which in its judgment may have occurred in the rating of a participant and to make such changes in the list of eligibles as may in their opinion be justified. It is important to note that this latter portion of Section 147.1, unlike the first portion dealing with the inspection of the papers, etc., makes it a matter for the exercise of the discretion of the Commission before any changes can be made in the examination or the list published. Accordingly the Commission is given the full power under this portion of Section 147.1 to exercise its discretion with regard to the matters contained therein.

There are many ways in which the discretionary power conferred upon the Commission by Section 147.1 can be exercised. The normal and most satisfactory way, however, is for the Civil Service Commission to inform all applicants of the manner in which they will review the questions and answers after the tentative list has been posted in order to determine whether or not errors have been made which in their opinion require adjustments in the posted list.

The Commission, aware of its duty to conduct all examinations in a fair and impartial manner, has adopted Rule 12 quoted above, which informs all persons concerned as to their rights throughout the entire course of the rating of the examinations. In this rule the Commission has established what will constitute the scope of its re-examination of the papers, questions, answers, marks or grades, under the authority vested in it by Section 147.1. They have provided for a fair and impartial testing and challenging of the rating key upon which the examination is to be rated prior to the rating of any of the papers of the participants. Having thus provided a fair and impartial method for challenging the rating key

upon which the examination will be rated prior to the correction of any papers, they have also provided that they will not entertain any further protests to the rating key after its final adoption. This rule when examined in the light of its purpose appears to be a reasonable exercise of the discretionary power granted to them under Section 147.1 on this subject. It is true that Rule 12 in more or less its present form was originally passed prior to the adoption of Section 147.1 of the Charter, but the record shows that this rule has been amended since the adoption of Section 147.1 and that the language pertaining to protests to the rating key has been left unchanged. It is reasonable to assume that the Commission when it had this rule before it for amendment saw no reason to make any change in the language dealing with the rating key. This decision was made subsequent to the passage of Section 147.1. The effect of amending this rule of the Civil Service Commission was to re-state it and re-publish it in its present language which I have quoted in full above.

Because of the particular way in which this rule is written, I have made some factual studies of the type of questions which are currently being used by the Civil Service Commission in entrance and promotional examinations conducted by it. I have also researched the question of the necessity of adopting a final key in advance of rating an examination in a number of texts on the subject. This survey revealed the fact that at the present time the Civil Service Commission is using either true, false or multiple choice form of questions almost exclusively. It is true that in certain highly specialized technical examinations, such as engineers, problems are presented which can only be solved by the ascertainment of one particular answer. The conclusion that I have reached from this survey and study is that the answers to all of the questions being presently asked in examinations conducted by the Civil Service Commission can be established objectively. Thus a rating key adopted on an objective basis requires no subjective action on the part of the person rating the examination. All authorities in the field which I have examined state unequivocally that this type of examination is one in which only "objective items" are used. The authorities further state that answers which are capable of being reduced to such clear cut and unequivocal norms leave no room for the ironing out of apparent dissatisfactions by the participants and the examining authority after the results of the examination have been posted. Finality of ratings must be established in this type of examination in order to assure the object of the merit system. Any published results in which the rating key could subsequently be challenged would destroy this finality and greatly impair the value of objective testing. Since the Commission at all times was fully aware

of the necessity of making the rating key final it is reasonable to assume that its method of accomplishing this was through the adoption of Rule 12.

I have discussed the question of objective testing in this opinion because it appears to me that it explains and establishes the reasonableness of Rule 12, which cuts off any further protests to the rating key once the Commission has adopted the final rating key. It should be noted that nothing that I have said in this opinion should be construed as applying to essay or other type questions which require subjective testing by the examiners before they can be rated.

Therefore, in my opinion, Section 147.1 places a broad discretion in the Civil Service Commission's right to alter posted tentative lists. The Commission has, under its broad rule making power covering examinations, under Sections 141 and 147.1, enacted a rule which prohibits any protests to the final rating key after its adoption. This rule is a reasonable exercise of its discretion under Section 147.1. Consequently, there is no conflict between Rule 12 of the Civil Service Commission and the language of Section 147.1 dealing with the authority of the Commission to re-rate examinations after the tentative list has been posted.

Respectfully submitted,

DION R. HOLM
City Attorney

BJW/WFB

TO: CIVIL SERVICE COMMISSION
151 City Hall
San Francisco 2

Attention: Mr. William L. Henderson
Personal Director and Secretary

OPINION NO. 1020

November 18, 1955

SUBJECT: SHERIFF, PRISONERS' WELFARE FUND, USE FOR LOCAL CARFARE ON DISCHARGE OF PRISONERS, ALSO FOR RAIL OR BUS FARE TO HOME IN CALIFORNIA. (SEC. 4025, PENAL CODE)

Dear Sir:

This office is in receipt of your request for an opinion as follows:

REQUEST

> "A practice of alloting 15¢ to a discharged inmate at San Bruno has been the practice of the Sheriff's Office for many years. The funds formerly came from the Carfare Fund of this office, however, the funds are not alloted from the Prisoners' Welfare Fund. The practice of discharging inmates from the van at St. Francis Circle has been changed. The discharge point is in downtown San Francisco; however, the 15¢ is alloted to those without funds.
>
> "I would be pleased to receive your views relative to the Sheriff's Office increasing the amount.
>
> "Another matter that I would be pleased to have your views on is: Could the Sheriff purchase rail or bus tickets to send inmates to their homes in California. The funds to come from the Prisoners' Welfare Fund.
>
> "I would be pleased to receive your views relative to the Prisoners' Welfare Fund under Section 4025 Penal Code State of California."

OPINION

Section 4025 of the Penal Code sets up the structure for the establishment and maintenance of a store at the County Jail and for the deposit of the profits in an inmates Welfare Fund and for the expenditure from that fund. Subsection (d) provides:

> "(d) The money and property deposited in the inmate welfare fund shall be expended by the sheriff solely for the benefit, education, and welfare of the inmates confined within the jail. An itemized report of such expenditures shall be submitted annually to the board of supervisors."

It is apparent from the reading of this section that it is a declaration of the purposes for which these funds are to be used. They are to be expended for the use of the prisoners rather than for a non-prisoner use. Thus, the language restricts the use of the funds to be for the benefit, education and welfare of the prisoners.

For a period of years the sheriff has been giving prisoners carfare upon discharge from this fund. This custom would give rise to the application of the doctrine of contemporaneous construction. In the absence of language to the contrary this interpretation is consistent with the purposes set out in the statute. There may be occasions when a prisoner is without any funds and where his morale would be benefited if he knew that upon discharge he would be given a small sum of money over the 15¢ carfare allowance. If a prisoner's welfare is thus enhanced by an increase in this amount the sheriff may, in his discretion, add to it such additional sum as he feels necessary to accomplish this purpose. Therefore, the sheriff may increase the amount given to a prisoner in need upon discharge.

Question #2. Could the sheriff purchase rail or bus tickets to send inmates to their homes in California?

Following the same line of reasoning, the sheriff could make such purchases. It would greatly add to an inmate's morale while in jail to know that upon his release he could return to his home if in California. Thus, such an expenditure is for the benefit and welfare of the prisoners and comes within the language of subsection (d) of Section 4025 of the Penal Code.

Respectfully submitted,

DION R. HOLM
City Attorney

AOS/WFB

TO: Mr. Daniel Gallagher
Sheriff, City and County of San Francisco
City Hall
San Francisco 2, California

OPINION NO. 1021

November 22, 1955

SUBJECT: APPROPRIATION ORDINANCE CREATING POSITION OF INSTRUCTOR OF NURSING, DEPARTMENT OF PUBLIC HEALTH; LEGALITY OF COMPENSATING OCCUPANT OF POSITION AT SALARY OF POSITION PRIOR TO EFFECTIVE DATE OF ORDINANCE.

Gentlemen:

I have your request for an opinion as follows:

REQUEST

"The Finance Committee had for consideration at its meeting on Wednesday, September 28, 1955, File No. 13697, appropriating $3,545, Public Health, San Francisco Hospital, for one position of P304 Instructor of Nursing; abolishing one position of P102 Registered Nurse, and validating related annual salary ordinance 1955-56.

"In this connection you will find attached hereto communication from Dr. Sox, Director of Public Health, dated September 27, 1955, explaining the circumstances in connection with the position of Instructor of Nurses proposed to be created by the measure above referred to, File 13697.

"This measure proposes the creation of the position referred to and the payment of the salary allocated for such position prospectively, from the effective date of said measure.

"You will note from the attached letter of Dr. Sox that, although the position referred to has not heretofore been created, a Registered Nurse in the Department of Public Health has been performing the duties of the position of Instructor of Nursing since July 1, 1955.

"I have been directed by the Finance Committee to request your opinion whether or not under the circumstances recited it is legal and proper to compensate the Registered Nurse who has been performing the duties of Instructor of Nursing since July 1, 1955, for the difference between the salary which she received as a Registered Nurse and the entrance salary allocated to Instructor of Nursing."

Dr. Sox's letter referred to in your request reads as follows:

"Your Committee has before you an Appropriation Ordinance Amendment which reflects the reclassification of one position of P102 Registered Nurse, San Francisco Hospital, to P304 Instructor of Nursing, San Francisco Hospital.

"This reclassification was requested by this Department on April 6, 1955. The matter was approved at the Civil Service Meeting of April 22, 1955. The necessary Salary Ordinance Amendment was prepared by the Civil Service Commission - but because of the time limitation involved in the fiscal procedure in amending the Salary and Appropriation Ordinances, the Salary Ordinance Amendment was canceled and the Commission ordered that the reclassification take effect on July 1, 1955. The current Salary Ordinance reflects this reclassification.

"Since the budget which was adopted by the Board of Supervisors did not include this reclassification, it has been necessary to submit an amendment to the Appropriation Ordinance to accomplish this fact. In the meantime, a qualified Instructor of Nursing at San Francisco Hospital - who appears on the payroll as a P102 Registered Nurse - has been performing these duties.

"This employee accepted the assignment with the understanding that the position would be created on July 1, 1955 - and has now been required to work three months at the salary of a Registered Nurse. We respectfully point out that the entrance salary of Registered Nurse is $315.00 a month while the entrance salary for Instructor of Nursing is $405.00 a month. The delay in amending the Appropriation Ordinance has resulted in a loss of salary of $90.00 a month for this employee.

"In the interest of equity, we respectfully request that the Appropriation Ordinance reflect the reclassification of this position - effective July 1, 1955. If your Board approves this request we will submit the necessary payrolls to reimburse the employee involved."

OPINION

The facts as outlined in the foregoing letters and as additionally furnished me by the offices of the Controller and the Mayor indicate substantially the following situation:

The Budget as adopted by the Board of Supervisors reflected 214 positions of P102 Registered Nurse and 3 positions of P304 Instructor of Nursing. The annual salary ordinance adopted on June 1, 1955, however, indicated 213 P102 positions and 4 P304 positions. On June 9, 1955 the Department of Public Health requested a validating appropriation for the creation of the extra position of P304, Instructor of Nursing. On June 22, 1955, this position was deleted by the Mayor. On June 23, 1955 the Department of Public Health resubmitted its request and on August 31, 1955 the Mayor approved the request for the creation of the position with funds being allocated for it prospectively from the anticipated effective date of the appropriation ordinance. On September 28, 1955 the Finance Committee recommended "do pass" on the appropriation ordinance as submitted by the Mayor and on October 10, 1955 the ordinance was finally passed by the Board. From July 1, 1955 a Registered Nurse had been performing the duties of the position of an Instructor of Nursing and you ask whether under the above circumstances it would be legal and proper to compensate the Registered Nurse for the difference between the salary she received as a Registered Nurse and the entrance salary of Instructor of Nursing from July 1, 1955 to the effective date of the appropriation ordinance.

I regret to advise that under the circumstances recited it would not be legal to compensate the Registered Nurse for the difference in salary for the period indicated.

Under Section 143 of the Charter positions in departments of the city and county are created by appropriation ordinance of the Board of Supervisors. Appropriation ordinances under the provisions of Section 72 and Section 80 of the Charter require a channeling and approval process from the department and through the Mayor and the Board of Supervisors.

It is a fundamental principle of municipal law that the mode is the measure of power and that no obligation can be created against public funds unless and until the prescribed mode has been followed. (See: Sullivan v. McKinley, 14 Cal. 2d 113; Williams Bros. v. Haas, 53 C.A. 2d 415; Brown v. Boyd, 33 C.A. 2d 416.)

As stated in Brown v. Boyd, supra:

> "This conclusion rests upon the ancient doctrine announced in Zottman v. City of San Francisco, 20 Cal. 96, 102 that 'the mode in such cases constitutes the measure of the power.' If the city was without power

> to create the positions in the manner followed, the payment of compensation to the occupants is beyond the power of the city authorities, and hence subject to restraint under the code section."

Here the position in question was not legally created nor could it be until the proposed legislation had received the requisite approvals and had become effective as an appropriation ordinance. The legal obligation to pay the salary did not arise until that time, and then only prospectively to the extent of the funds appropriated for the position.

You are advised accordingly.

Respectfully submitted,

DION R. HOLM
City Attorney

TJB/BJW

TO: BOARD OF SUPERVISORS
235 City Hall
San Francisco 2

Attention: Mr. John R. McGrath
Clerk of the Board

OPINION No. 1022

November 28, 1955

SUBJECT: HEALTH SERVICE SYSTEM; COVERAGE OF FORMER EMPLOYEE BY SYSTEM BASED ON FACT THAT RETIREMENT SYSTEM CONTRIBUTIONS HAVE NOT BEEN REFUNDED.

Gentlemen:

I have your request for opinion as follows:

REQUEST

"At the September meeting of the Health Service Board appearance was made before the Board in behalf of our former member No. 20088. This member terminated her employment as of April 5th, 1955, because of ill health, and applied the same day to the Retirement System for the return of her contributions.

"Retirement contributions were mailed by registered mail from the Retirement System, we are informed, on May 20th and signed for the same date by George S. O'Brien.

"Subsequent to her resignation this lady entered the hospital on April 24th, 1955, and the Health Service System paid for 7 days $105.00 and auxiliary benefits $21.60, taking her through April 30th, and the Board rejected an appeal for treatment beyond that date.

"It has been the custom of the Health Service System to cover the member through the pay period in which termination of employment occurs and contributions are paid, but in no event beyond the end of the month in which termination occurs. The member had paid directly to this office, on April 13th, contributions to May 15th, which were receipted for because of the fact that notification of her resignation had not been received. Another contribution was made May 19th to cover through June, but on May 30th $11.40 contributions were refunded to the former member for May and June to which she was not entitled.

"The member bases her plea on the premise that she had not withdrawn her Retirement funds until they were actually in her hands and therefore was a member of the Retirement System until that date.

"The Board has directed the Secretary to request your opinion as to whether the Health Service Board's interpretation is correct; or if the member has further claim."

OPINION

In my opinion the Health Service Board's interpretation is correct and the member has no further claim against the System.

Charter §172.1, subd. 1, provides that the members of the Health Service System shall consist of all "employees" of the city and county who are members of the Retirement System. Subdivision 3 provides that the Health Service Board shall have power to make provision for the participation in the benefits of the System by "retired municipal employees."

The party in question ceased to be an employee of the City and County on April 5, 1955. Hence her right to membership in the Health Service System under §172.1, subd. 1, ceased as of that date.

Did she then become a "retired municipal employee" under subdivision 3?

The Charter references to "retired persons," "retired members," "member retired," "person who has retired" (§§159, 163, 163 (b), 165 (b), 165.1.1, 165.3.2, 165.2 (B), 165.2 (J), 166(a), 168.1.2, 171.1.12), mean former employees who have been retired on a pension under the compulsory retirement provisions of the Charter or by action of the Retirement Board. The reference in §172.1, subd. 3(e) to "retired municipal employees" means the same. For where the same word ("retired") is used in different parts of a statute, it will be presumed to be used in the same sense throughout. (59 C.J. 1003.) A miscellaneous employee who resigns and applies for a refund of her contributions is not a retired municipal employee. (Cf. Op. No. 982, August 17, 1955.) The person in question therefore has no claim to Health Service System membership under §172.1, subd. 3.

In a memorandum attached to your request, it is suggested that my Opinion No. 982, supra, indicates a contrary conclusion to the one here reached. This is not so. That opinion involved teachers whose retirement was imminent and who contemplated resigning and withdrawing their Retirement System contributions from the Retirement System and depositing them in the State Teachers' Retirement System. The teachers felt that their benefits under the State System might be greater than under the City System. If they waited until they were mandatorily retired under the City System and then tried to make the withdrawal, the funds would not have been subject to withdrawal. (Charter §165.2(F); Op. No. 1012, November 4, 1955) Opinion No. 982 held that if they resigned and withdrew their contributions, they would not be "retired municipal employees," and therefore would not be eligible for membership in the Health Service System. That opinion did not hold, nor was it intended to imply, that during the period elapsing between the date they resigned and applied for a refund of their Retirement System contributions and the date of their receipt of the warrant therefor, they were retired municipal employees.

The memorandum you attach advances this argument: "The Retirement System could not at one time retain the funds of an employee and at the same time regard the employee as no longer a member of the System. Hence, it must follow that until the employee receives his contributions, he is a member of the Retirement System and necessarily a member of the Health Service System." Without considering the validity of the premise, the conclusion nevertheless fails because the Charter provides not for membership in the Health Service System by all members of the Retirement System, but only by those members who are either employees or retired employees. It should not be thought that every person who possesses some right against the Retirement System (e.g., a right to refund of contributions) is a retired employee.

Since the party in question ceased to be an employee of the City and County on April 5, 1955, and was not thereafter a "retired municipal employee," her membership in the Health Service System terminated on that date and it is immaterial that she did not receive a warrant for the refund of her Retirement System contributions until May 20, 1955.

The Board's custom of covering the member through the pay period in which termination of employment occurs, seems to be a proper one.

You are advised accordingly.

Respectfully submitted,

DION R. HOLM, City Attorney.

TO: HEALTH SERVICE SYSTEM
61 Grove Street
San Francisco 2

Attention: Mrs. Zella B. Haynes,
Secretary.

GEB/NSW

OPINION NO. 1023

December 1, 1955

SUBJECT: RATE OF COMPENSATION FOR H2 FIREMAN WHO FORMERLY SERVED AS H202 FIREMAN, SALVAGE CORPS; WHETHER SALVAGE CORPS SERVICE IS TO BE CREDITED IN DETERMINING SUCH COMPENSATION.

Dear Sir:

I have received your following request for opinion:

REQUEST

> "Section 36.2 of the charter provides the method for fixing the rate of compensation for the members of the Fire Department and provides for certain compensation 'for firemen' based on years of service.
>
> "A question has been raised concerning employees who have served for a period of time as H202 Firemen, Salvage Corps, and who then accept appointment as H2 Firemen.
>
> "Your opinion is respectfully requested as to whether the calculation of the proper compensation due such H2 Firemen would include credit for service as H202 Firemen, Salvage Corps."

OPINION

First, there can be no doubt that by present Charter definition, the personnel of the Salvage Corps are members of the Fire Department. (See Charter Section 38.1.) It must also be noted that in the municipal election of November 8, 1955, the electorate approved amendments to Charter Section 36 (titled "Fire Department") which define the position classifications in the Salvage Corps as being among "the several ranks in the fire department." (See Fifth paragraph, as amended.)

The applicable charter provisions regarding rates of compensation herein are found in Section 36.2. Insofar as pertinent to the instant problem, that section provides as follows:

> "Not later than the 15th day of February of each year, the civil service commission shall survey and certify to the board of supervisors rates of compensation paid firemen employed in the respective fire departments in all cities of 100,000 population or over in the State of California, based upon the latest federal decennial census.

> "Not later than the 1st day of April of each year, the board of supervisors shall have the power, and it shall be its duty, by ordinance, to fix rates of compensation for the members of the fire department whose annual compensations are set forth or otherwise provided in sections 36 and 38.1 of this charter, and said rates shall be in lieu of said annual compensations and shall be effective on the 1st day of July next following.
>
> "The rates of compensation, fixed in said ordinance,
>
> "(a) for the fourth year of service and thereafter for firemen shall not exceed the highest rate of compensation paid firemen in regular service in the cities included in the certified report of the civil service commission;
>
> "(b) for the first, second and third year of service for firemen shall include the same amount of adjustment as that used in fixing the rates of compensation for the fourth year of service for the same class;
>
> "(c) for said members of the fire department other than firemen shall include the same per cent of adjustment as that established by said ordinance for firemen in the fourth year of service; . . ." (Emphasis added.)

Since the adoption thereof in 1942, Section 38.1 of the Charter (titled "Salvage Corps") has provided that

> "The officers and members of said salvage corps shall receive respectively the salaries provided for captains, lieutenants and hosemen provided by section 36 of the charter. . . ."

With the adoption, in 1952, of Charter Section 36.2, Charter Section 36 was thereby superseded as to the matter of fixing salaries for officers and members of the Salvage Corps and other personnel of the fire department.

In prescribing the formulae for setting salaries for the personnel of the fire department, the basic designation used in Section 36.2 is "firemen" -- and the Board of Supervisors is mandated to fix a rate for such "firemen" on a scheme of range levels through the first, second, third and fourth years of service. Officer personnel of the department are designated in Section 36.2 as "members of the fire department other than firemen," and salary rates therefor are directed to be set on an adjustment basis with relation to the rate fixed for "firemen in the fourth year of service."

The designation "firemen," as used in prescribing the method for fixing salary rates and ranges, is given special significance by the last paragraph of Section 36.2, wherein it is

provided that

> "The term 'firemen' as used in this section shall mean the persons employed, in the fire departments of said cities of 100,000 population or over or of the City and County of San Francisco, to perform substantially the duties being performed on the effective date of this section by drivers, stokers, tillermen, truckmen or hosemen, in the San Francisco Fire Department."

Consideration of the foregoing matters leads me to conclude that the designation "firemen," as used in Section 36.2, has reference to the class H2 Fireman; and that the reference noted above to range wage rates for the first, second, third and fourth years "of service" means service in said class. Of course, since the salary rates for officers and members of the Salvage Corps must be the same as those for captains, lieutenants and H2 Firemen of the Fire Department, the same range scales apply for first, second, third and fourth years "of service" for H202 Fireman, Salvage Corps.

However, such is the limit within which prior service can affect wage increase privileges as between the classes H2 Fireman, Fire Department, and H202 Fireman, Salvage Corps, and it is my view that Section 36.2 does not contemplate that prior service as an H202 Fireman, Salvage Corps can be credited to a member of the department who, after examination, accepts an appointment to the class H2 Fireman, Fire Department. In short, it is my conclusion that the "years of service" wage increments provided for in Section 36.2 are intended to apply only to service in the class, i.e. H2 or H202, in which the service is performed.

It will be noted that the views expressed herein are consistent with the conclusions reached in my Opinion No. 706, dated June 25, 1953, wherein it was said that similar wage range increment provisions affecting personnel of the Police Department (Charter Section 35.5.1) would not allow "years of service" credit for an appointee to the class Q2 Policeman who had served for six (6) years in the class Q30 Police Patrol Driver.

You are advised as above set forth with regard to the question proposed.

Respectfully submitted,

DION R. HOLM, City Attorney.

TO: WILLIAM L. HENDERSON
Personnel Director and Secretary
Civil Service Commission
151 City Hall, San Francisco 2

WFB/BJW

OPINION NO. 1024

December 1, 1955

SUBJECT: LOG CABIN RANCH PROPERTY, OWNERSHIP;
JUVENILE PROBATION COMMITTEE, AUTHORITY
TO NEGOTIATE LEASE OF PROPERTY.

Dear Sir:

This office is in receipt of your request for opinion as follows:

REQUEST

> "The Juvenile Probation Committee has been approached recently by a petroleum development company with a proposal to lease the San Mateo County property on which Log Cabin Ranch is located.
>
> "Members of the Committee would like to have your official opinion on (1) whether or not ownership of the property is vested in the Juvenile Probation Committee, and (2) what authority the Juvenile Probation Committee might have in negotiating such a lease."

In addition to the information furnished in your letter quoted above, I was informally advised by Mr. Thomas Strycula, Chief Juvenile Probation Officer, that in the event a lease is executed the lease would provide that operations thereunder by the lessee would be restricted to such portions of the leased premises as would avoid any interference with the operations of the Log Cabin Ranch or its program.

OPINION

Ownership of the Log Cabin Ranch property is vested in the City and County of San Francisco, having been acquired by grant deed naming the City and County of San Francisco, a municipal corporation, as grantee, dated July 24, 1942, recorded July 30, 1942 in Volume 1031, at page 4 of the Official Records, San Mateo County.

Section 91 of the charter provides that the Director of Property shall have charge of ". . . . the sale and lease of real property and improvements thereon owned by the city and county, except as otherwise provided by this charter".

So far as here applicable, Section 93 of the charter reads in part as follows:

> "SECTION 93. When the head of any department in charge of real property shall report to the board of supervisors that certain land is not required for the purposes of the

> department, the board of supervisors, by ordinance, may authorize the lease of such property. The director of property shall arrange for such lease for a period not to exceed twenty years, to the highest responsible bidder at the highest monthly rent. The director of property shall collect rents due under such lease. . . ."

Section 154, Part I, San Francisco Municipal Code reads as follows:

> "SEC. 154. Real Property Negotiations, How Conducted. Pursuant to Sections 91, 92, 93 and 94 of the charter, each department, board and commission of the City and County of San Francisco shall conduct all negotiations through the Director of Property for purchasing, acquiring, accepting, exchanging, leasing, renting, selling, granting, conveying and/or relinquishing any real property or interest therein, required for or owned by the city and county, except as otherwise specifically provided by the Charter."

Section 156, Part I, San Francisco Municipal Code reads as follows:

> "SEC. 156. Approval of Resolutions and Ordinances. All resolutions and ordinances involving transactions covered by Sections 154 and 155 of Part I must be approved by the Director of Property before adoption or enactment."

Section 150, Part I, San Francisco Municipal Code reads as follows:

> "SEC. 150. Real Estate Department, Collection of Rents By. Pursuant to Section 93 of the Charter, the Real Estate Department of the City and County of San Francisco is authorized and directed to collect all rents due under leases of city-owned real property and improvements, except Water Department lands leased for agricultural purposes."

Section 153, Part I, San Francisco Municipal Code reads as follows:

> "SEC. 153. Deposit of Moneys. All moneys received by the Real Estate Department in payment of rents, except for

> the charges mentioned in Sections 151 and 152 of this Article, shall be deposited in the proper funds to the credit of the various departments having control of the city-owned leased real property and improvements."

Summarizing, therefore, you are advised that the ownership of the subject property is vested in the City and County of San Francisco and not in the Juvenile Probation Committee. Upon being advised by the head of the department in charge of the Log Cabin Ranch School property that certain of the land is not required for the purposes of the department, the Board of Supervisors, by ordinance, may authorize the lease of such property. Thereupon, negotiations for leasing the property may be had. All negotiations for leasing the property must be conducted through the Director of Property; and, in the event that the property is leased, the moneys received by the Director of Property in payment of rents shall be deposited (except for fees properly chargeable by the Real Estate Department for collection and renting and for negotiating the lease, provided for by Sections 151 and 152, Part I, San Francisco Municipal Code) in the general fund of the city and county to the credit of the Youth Guidance Center, Log Cabin Ranch School.

Respectfully submitted,

DION R. HOLM
City Attorney

TO: Mr. M. E. Cooley
Chairman, Juvenile Probation Committee
Youth Guidance Center
375 Woodside Avenue
San Francisco 27

JJT/NSW

OPINION NO. 1025

December 2, 1955

SUBJECT: MAY MEMBERS OF RECREATION AND PARK COMMISSION BE LIABLE AS INDIVIDUALS FOR DAMAGES BY ANYONE SUFFERING INJURY ON PROPERTY UNDER JURISDICTION OF THE COMMISSION.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

REQUEST

> "At the last regular meeting of the Recreation and Park Commission, held March 24, 1955, it was directed that a request be made of the City Attorney for a written opinion as to the individual liability of commissioners as the result of accident growing out of any special event conducted on department property.
>
> "Will you therefore please advise if the members of the Recreation and Park Commission, as individuals, can be held liable for damages by anyone suffering injury as the result of an accident on property under the jurisdiction of this commission."

OPINION

I have ascertained by further inquiry that the Commissioners had in mind liability which might possibly attach to them should someone suffer an injury during the holding of automobile races in Golden Gate Park, or under comparable circumstances.

You are advised that the members of the Recreation and Park Commission as individuals may be held liable in certain instances. Section 42 of the Charter of the City and County of San Francisco reads in part as follows:

> "The recreation and park commission shall have the complete and exclusive control, management and direction of the parks, playgrounds, recreation centers and all other recreation facilities, squares, avenues and grounds which are in the charge of either of said commissions on the effective date hereof, or are thereafter placed in the charge of this commission, . . . "

The liability of officers and employees of the City and County of San Francisco is limited by Sections 1953-2002 of the Government Code of the State of California.

Section 1953 reads as follows:

"Liability of officer for damage or injury from defective or dangerous condition of public property. No officer of

the State or of any district, county, or city is liable for any damage or injury to any person or property resulting from the defective or dangerous condition of any public property, unless all of the following first appear:

"(a) [Direct and proximate result.] The injury sustained was the direct and proximate result of such defective or dangerous condition.

"(b) [Notice of defective or dangerous condition.] The officer had notice of such defective or dangerous condition or such defective or dangerous condition was directly attributable to work done by him, or under his direction, in a negligent, careless or unworkmanlike manner.

"(c) [Authority, duty and availability of funds to remedy condition.] He had authority and it was his duty to remedy such condition at the expense of the State or of a political subdivision thereof and that funds for that purpose were immediately available to him.

"(d) [Failure to remedy condition or give warning.] Within a reasonable time after receiving such notice and being able to remedy such condition, he failed so to do, or failed to take reasonable steps to give adequate warning of such condition.

"(e) [Careful use of property and due care to avoid danger.] The damage or injury was sustained while such public property was being carefully used, and due care was being exercised to avoid the danger due to such condition."

Section 1953.6 reads as follows:

"Personal liability for negligence of deputies and employees: Construction of section. No officer of a county, city, or city and county, whose sole compensation by virtue of his office is a fixed salary established by the Legislature, the local governing body, or the board of supervisors, shall be personally liable for the negligent act or omission of any deputy or employee serving under him and performing the duties of his office, where the appointment or qualification of such deputy or employee is required to be and has been approved by the local governing body or the board of supervisors, or by the civil service commission, unless the officer failed to exercise due care in the selection, appointment, or supervision of such deputy or employee, or negligently failed to suspend or secure the discharge of such deputy or employee after knowledge or notice of his inefficiency or incompetency.

"Nothing in this section shall be interpreted as placing any liability upon the principal officer for the act of a deputy or employee unless such liability is otherwise imposed upon the principal officer by law, nor shall this section be construed or interpreted as releasing or relieving any such county, city, or city and county of any liability for the negligent act or omission of any such deputy or employee otherwise imposed by law."

Section 1954 reads as follows:

"Liability of board member for negligent act or omission of appointee or employee. No member of any board is liable for the negligent act or omission of any appointee or employee appointed or employed by him in his official capacity, whether the appointment or employment was made singly or in conjunction with other members of the board, unless the member or members of the board making the appointment or employment either:

"(a) [Knowledge or notice of inefficiency or incompetency.] Knew or had notice that the person appointed or employed was inefficient and incompetent to perform or render the service or services for which he was appointed or employed.

"(b) [Retention after knowledge or notice.] Retained such inefficient or incompetent person after knowledge or notice of such inefficiency or incompetency.

Section 1956 reads as follows:

"Insurance of officers, etc., against liability: Charging premium. The State, a county, city, district, or any other public agency or public corporation may insure its officers, deputies, assistants, agents, and employees against any liability, other than a liability which may be insured against under the provisions of Division 4 of the Labor Code, for injuries or damages resulting from their negligence or carelessness during the course of their service or employment and for the injuries or damages resulting from the dangerous or defective condition of public property, including public property as defined in Article 2, and due to their alleged negligence or carelessness, and school districts, counties, and municipalities may insure their officers, including officers defined in Article 2, against any liability, other than a liability which may be insured against under the provisions of Division 4 of the Labor Code, for injuries or damages resulting from false arrest or false imprisonment, either by self-insurance or in any insurer authorized to transact such insurance in the

> State. The premium for the insurance is a proper charge against the Treasury of the State, County, city, district, public agency, or public corporation."

Section 53051 of said Government Code also sets forth the required elements under which liability would attach to the City and County of San Francisco for dangerous or defective conditions of public property.

It is apparent that there is an inherent danger in automobile racing along a roadway not designed for such racing. (See Saari v. State, 125 N Y S 2d 507.) A dangerous or defective condition can be created by the use or general plan of operation of government property as well as by structural defect. (See Bauman v. San Francisco, 42 C A 2d 144; Huff v. Compton City Grammar School District, 92 C A 2d 44; Plaza v. City of San Mateo, 123 C A 2d 103; 37 A L R 2d 412 to 415.)

If the Park and Recreation Commission knowingly permits the use of park property in such a manner that a dangerous or defective condition arises thereby the individual members of said Commission may be liable to anyone suffering an injury therefrom. For example, if the Park and Recreation Commission should permit automobile racing on park property and not set up adequate safeguards well calculated to prevent injury to the public by racing mishaps, then the individual commission members would subject themselves to liability under Section 1953 of the Government Code as aforesaid.

You are so advised.

Respectfully submitted,

DION R. HOLM, City Attorney.

TO: WM. J. SIMONS, Executive
Secretary to the
General Manager
Recreation and Park Department
McLaren Lodge, Golden Gate Park
San Francisco 17

DJK/WFB

OPINION NO. 1026

December 6, 1955

SUBJECT: DIAMOND HEIGHTS REDEVELOPMENT PLAN, QUALIFICATION, FOR UTILIZATION OF AREA DESIGNATED FOR INSTITUTIONAL USE, OF A PRIVATE NONPROFIT FRATERNAL ASSOCIATION.

Gentlemen:

This office is in receipt of your request for an opinion as follows:

REQUEST

> "At the last regular meeting of the Agency, representatives of the Masonic Lodges of San Francisco appeared and indicated that they were interested in erecting a building in the Diamond Heights Approved Project Area for their own use, said building to contain lodge rooms and a banquet hall. It is their purpose to offer the banquet hall for rental purposes.
>
> "As the Diamond Heights Redevelopment Plan has designated certain portions of the area for institutional use, you are hereby requested to give us your opinion as to whether or not such a building would qualify for the utilization of area designated for institutional use."

OPINION

I have carefully reviewed the Diamond Heights Redevelopment Plan, and have noted that on page 27 thereof it is stated "Areas designated for institutional use are intended for churches, private or parochial schools, or similar related institutional use." (Emphasis added.)

As used in the Plan, the term "institutional use" is followed by the qualifying words "churches, private or parochial schools, or similar related institutional use."

It thus appears that the Redevelopment agency intended that such areas designated for institutional use be limited to the type of institution set forth in the Plan and be not available for use of all types of institutions.

An "institution" is an established or organized society or corporation. It may be private in its character, designed for profit to those composing an organization, or public or charitable in its purposes. The use of the word "institution" does not point to a public as distinguished from a private organization. (*Estate of Peabody*, 21 C A 2d 690; *Estate of Sutro*, 155 Cal. 727.)

The term "institution" has been held to include a gymnastic association (*German Gymnastic Assn. v. Louisville,* 80 S.W. 201) and

the historical club of a county (In re Montgomery Co. Historical Society, 13 Mont. Co. Pa. 205).

A Masonic Lodge, in my opinion, is an "institution" that would ordinarily qualify for utilization of space designated in the Diamond Heights Redevelopment Plan for institutional use, if such Plan did not limit the term "institutional use."

In its commonly accepted term, a church building is a place where people assemble for worship and for the administration of such offices and services as pertain to that worship.

"School" is a generic term, and denotes an institution of learning; an educational establishment.

"School" as used in tax exemption laws, has been defined as any institution of learning or as a place where systematic instruction is given in useful branches of knowledge as commonly understood.

The Masonic Order is essentially a fraternal and social order. It has many religious, charitable and educational aspects and attributes.

It has been held that a Masonic Lodge is not an educational institution. (Masonic Building Association of Stamford, Connecticut v. Town of Stamford, 174 A. 301, 303.)

In Salvation Army v. Frankenstein, 153 N.E. 277, it was held that a building used for a maternity hospital in which religious services were conducted was not a "church."

"Similar" means nearly corresponding; resembling in many respects; somewhat alike; having a general likeness. (Royer v. Brown, 93 A. 2d 667, 668.)

"Related" means standing in relation; connected; allied; akin. (Nowland Realty Co. v. Commissioner of Internal Revenue, 47 F 2d 1018, 1021.)

The structure described in your letter is to be used solely for use as a Masonic Lodge; said building to contain lodge rooms and a banquet hall for rental purposes.

It is my opinion that such a structure is neither a school nor church, or a similar related institutional use, and therefore would not qualify for utilization of areas designated in the Diamond Heights Redevelopment Plan for institutional use.

The Redevelopment Plan provides for the development of commercial areas; and the type of use which may be permitted in such commercial areas is very broad.

The Plan further provides that "all areas designated for commercial uses are designed as planned unit developments." "Certain areas are to be designed as planned unit developments in order to achieve a more harmonious and integrated site development. Proposals for development of such areas will be subject to the approval of the Agency and the City Planning Commission."

The Agency and representatives of the Masonic Lodge could, subject to approval by the City Planning Commission, work out a method whereby a Masonic Lodge could be erected in an area designated in the Diamond Heights Redevelopment Plan for commercial use.

Respectfully submitted,

DION R. HOLM, City Attorney.

TO: REDEVELOPMENT AGENCY of the City
and County of San Francisco
512 Golden Gate Avenue
San Francisco 2

Attention: MR. EUGENE J. RIORDAN,
Director.

MG/JEB

Opinion No. 1027
December 6, 1955

SUBJECT: INTERPRETATION OF ACTION OF BOARD OF PERMIT APPEALS IN GRANTING PERMIT FOR BUILDING DURING WAR EMERGENCY; DUTY OF DEPARTMENT OF PUBLIC WORKS.

Dear Sir:

I have your request for opinion as follows:

REQUEST

> "On January 15, 1944, a building permit, No. 70630, was issued to Fred S. Campbell Co. predicated on Decision No. 886 of the Board of Permit Appeals overruling the Director in the denial of a permit to erect a building on the west line of Laskie Street 176' north of Mission Street. The application for this permit was denied by the Department of Public Works on the grounds that it was in violation of Sec. 301 and Article 10 of the San Francisco Building Code.
>
> "The Board of Permit Appeals overruled the Director with the provision that this building would remain only for the duration of the War, and would be demolished at the termination of the Emergency.
>
> "The Fire Department made a verbal report to the Bureau of Building Inspection stating that it was their opinion that the structure was now being occupied illegally and not in conformity with the decision of the Board of Permit Appeals.
>
> "The Bureau of Building Inspection on June 30, 1953, issued a Warning of Violation to the Evans Auto Rental Company, owners of this property, that the building was being maintained in violation of the Board of Permit Appeals decision, and that the building should be demolished.
>
> "The owners, thru their attorneys, have questioned the right of the Department of Public Works to require the demolition of this building on the grounds that the War Emergency still exists, and the building should be permitted to remain.
>
> "Your opinion is therefore requested on the following:
>
> "1. Has the War Emergency been officially declared as ended?
>
> "2. Should the Department of Public Works now force compliance with the provisions of the stipulations of the Board of Permit Appeals on the issuance of the building permit?"

OPINION

1. In my opinion the war emergency has been officially declared ended. This declaration was made by Presidential Proclamation No. 2714, dated December 31, 1946, proclaiming "the cessation of hostilities of World War II, effective twelve o'clock noon, December 31, 1946." (12 Fed. Reg. 1)

It is not to be thought that the expressions "duration of the war" and "termination of the emergency", as used by laymen and even by lawyers and lawmakers, always mean until a peace treaty is signed. (*Kaiser* v. *Hopkins*, 6 C. 2d 537; *Lincoln* v. *Harvey*, /Tex. Civ. App./, 191 S.W. 2d 764, 765; City Attorney Opinions Nos. 3936, 3951, 3991 and 4037, of 1947; No. 271 of 1950).

As used by the Board of Permit Appeals these expressions had no such meaning, but referred instead to the termination of hostilities.

2. Yes. The Department of Public Works should now force compliance with the provisions of the stipulations of the Board of Permit Appeals on the issuance of the building permit.

Respectfully submitted,

DION R. HOLM
City Attorney

GEB/VB

To: Mr. Sherman P. Duckel
Director
Department of Public Works
260 City Hall
San Francisco 2.

Thru: Mr. T. A. Brooks
Chief Administrative Officer.

OPINION NO. 1028

December 12, 1955

SUBJECT: MUNICIPAL RAILWAY SPECIAL SHOPPER'S SERVICE; POWER OF PUBLIC UTILITIES COMMISSION TO DISCONTINUE SERVICE; JURISDICTION OF BOARD OF SUPERVISORS.

Dear Sir:

I have your request for an opinion as follows:

REQUEST

> "The Board of Supervisors is in receipt of Public Utilities Commission Resolution 15929, copy of which is attached hereto, recommending the extension for the calendar year 1956 the operation of the presently operated Municipal Railway Special Shopper's Fare.
>
> "I have been directed by Supervisor McCarty to call your attention to that portion of the Resolution wherein the Public Utilities Commission purports to reserve the right to terminate such service at any time during said calendar year 1956, when operating conditions of the Municipal Railway warrant such termination; and to request that you submit your opinion as to the efficacy of such a reservation in this type of Resolution.
>
> "Inasmuch as this matter will be considered by the Board of Supervisors on Monday, December 12, at the hour of 3 P.M., your opinion prior to that time will be appreciated."

Public Utilities Commission Resolution No. 15929, referred to in your letter, reads as follows:

> "RESOLVED, That this Commission hereby extends for the calendar year of 1956, the operation of the presently operated Municipal Railway Special Shopper's Fare, the Commission reserving the right to terminate said service at any time during said calendar year of 1956, when operating conditions of the Municipal Railway warrant such termination; and

"BE IT FURTHER RESOLVED, That the Board of Supervisors be and is hereby respectfully requested to confirm said extension of time."

OPINION

Under the provisions of Section 132.1 of the Charter no bus line or any portion thereof which has been in operation for a period of one year or more may be abandoned nor the service discontinued thereon except upon recommendation by the public utilities commission in writing to the Board of Supervisors. The Board has the right to disapprove such recommendation within 30 days after its receipt by nine votes after public hearing. If the recommendation is not so disapproved it becomes effective forthwith.

The Downtown Shopper's Shuttle Service has been in operation for a period considerably in excess of one year and the Mission Miracle Mile Service has now been in operation for a period slightly in excess of one year. Consequently the service on these lines can only be discontinued by following the procedure prescribed in §132.1 of the Charter hereinabove noted.

The legal effect of the statement by the Public Utilities Commission in its Resolution with reference to the discontinuance of service is merely to establish as a matter of public record its position that in continuing the five cent fare for the calendar year 1956, it is not guaranteeing the continuance of the service for the year or waiving its right to discontinue the service in the manner provided by law.

Thus construed, the statement is neither improper nor illegal and it must necessarily be so construed in view of the provisions of Section 132.1 of the Charter and the well established principle of construction applicable to statutes and other writings that where language is fairly susceptible of a construction that would make it legal and comport with the legitimate powers of the law making body, that is the construction which it should receive. In this connection it may be noted that when service is discontinued on any line such discontinuance is actually effected by the action of the Commission. Its recommendation in such cases does not require approval by the Board of Supervisors, the Board merely having the right to disapprove the recommendation of the Commission within 30 days by nine votes. Failure of the Board to so disapprove within the time limit makes the action of the Commission automatically operative.

I might point out that the Commission has been making the same statement with reference to the discontinuance of service in its successive resolutions continuing the five cent fare for the Shopper's Shuttle Service since 1953. The Board on its part in its resolutions approving the action of the Public Utilities Commission in continuing the fare has not been approving the resolutions of the Commission in toto, its customary procedure in other actions of this kind, but rather has by specific language merely approved the continuance of the five cent fare for the particular period involved. This same language is contained in the resolution that will be before you on Monday for adoption and it reads as follows:

> "RESOLVED, That the Board of Supervisors hereby approves and confirms the continuance of the five-cent fare for the calendar year 1956, for the presently operated Special Shopper's Shuttle Service of the Municipal Railway, as recommended by the Public Utilities Commission in its Resolution No. 15929."

In my opinion this language is legally adequate and precludes any contention that the Board is giving advance approval to any discontinuance of service or that it is making any commitment at all in this respect.

You are advised accordingly.

Respectfully submitted,

DION R. HOLM
City Attorney

TJB/TMO'C

TO: BOARD OF SUPERVISORS
235 City Hall
San Francisco 2

Attention: Mr. John R. McGrath
Clerk of the Board

OPINION NO. 1029

December 12, 1955

SUBJECT: CAMPAIGN STATEMENTS OF COMMITTEES REPRESENTING CANDIDATES IN THE GENERAL MUNICIPAL ELECTION OF NOVEMBER 8, 1955; NO NECESSITY FOR FILING.

Dear Sir:

You have requested an opinion of the City Attorney as follows:

REQUEST

> "The Charter of the City and County of San Francisco is silent on the necessity for filing candidates' statements; therefore, under Section 174, the general laws of the state would apply in all municipal elections.
>
> "The structure of the law with respect to filing of candidates' statements was changed at the 1955 session of the Legislature, Chapter 1640.
>
> "Will you please advise me if it is necessary, under the provisions of the present law, for committee treasurers to file campaign statements in behalf of committees representing candidates in a municipal election held under the provisions of our Charter."

OPINION

The above request follows an oral request with reference to the necessity for the treasurer of a campaign committee for candidates on the ballot in the election of November 8, 1955 to file campaign statements. The request has been made orally, also, that response be made before the 35th day after the date of that election, which period is the period of time set forth in Section 4532, Elections Code, in the following language:

> "§4532. Filing statements: Time. All candidates for either nomination or election, and the treasurer of each campaign committee, shall file their campaign statements within 35 days after the election or primary."

Since this period of 35 days expires on December 13, 1955, five days after receipt of your request, this opinion will relate solely to that election.

The election of November 8, 1955, was held pursuant to the provisions of Section 174 of the Charter and was a general municipal election. The officers chosen at that election were only such as were required by the Charter to be elected at that time. The provisions relating thereto as to the Mayor, members of the Board of Supervisors, District Attorney, Sheriff and Judges of the Municipal Court are contained in Section 5 of the Charter. Those relating to the Member of the Board of Education are contained in Section 134 of the Charter. The authority for including these provisions of the Charter is in subdivisions 2 and 4 of Section 8-1/2 of Article XI of the Constitution, San Francisco's Charter being adopted under the provisions of Sections 8 and 8-1/2 of this Article. These subdivisions authorize the Charter to provide, among other things, as it has done, for the manner in which, the method by which, and the times at which these officers shall be elected. Neither the Charter nor other local law contains any provision requiring committees or officers of committees to file statements of campaign expenditures. As you indicate in your request the question arises solely because of the provision contained in the first sentence of the second paragraph of Section 174 of the Charter, which is as follows:

> "All provisions of the general laws of this state, including penal laws, respecting the registration of voters, initiative, referendum and recall petitions, elections, canvass of returns and all matters pertinent to any and all of these, shall be applicable to the city and county, except as otherwise provided by this charter or by ordinance adopted by the board of supervisors as authorized by this charter relative to any rights, powers or duties of the city and county or its officers."

It therefore becomes necessary to refer to the state law on the subject. Division VII of the Elections Code is entitled "Election Campaigns." The first chapter of this division deals with the subject of expenditures for candidates. The first article of this chapter is entitled "Definitions." Section 4500 is the first section of this article, chapter and division. Its subject is "Construction of chapter according to definitions." The section is as follows:

> "Unless the context otherwise clearly requires, the definitions set forth in this article shall govern the construction of this chapter."

Section 4502, as amended in 1955, defines the term "Committee" as follows:

> "§4502. 'Committee': Appointment and duties of treasurer: Campaign statement. 'Committee' means a committee or group of persons organized for the purpose, or charged with the duty of conducting the election campaign of any political party, or of any candidate or group of candidates.
>
> "Every committee shall appoint a treasurer, who shall receive and disburse all moneys contributed for campaign purposes, and keep a true account thereof, and shall in the same manner and on the same type of forms as required of candidates, file a campaign statement. The county clerk as defined in Section 18 upon request shall furnish such treasurer with the necessary forms for submitting the statement required of him by this section."

Section 4501, also amended in 1955, defines the term "Candidate" and is as follows:

> "§4501. 'Candidate.' 'Candidate' means any person who has filed a declaration of candidacy or who has accepted a declaration of candidacy filed by sponsors in his behalf, pursuant to Section 2621 of this code."

It should be noted that this section is new and was added to the Elections Code by the Legislature of 1955. "Committee" as referred to in this chapter, which relates to expenditures for candidates, is a committee or group of persons organized for the purpose, or charged with the duty, among other things, of conducting the election campaign of a candidate as the term "candidate" is defined in Section 4501. It becomes of first importance, therefore, to determine what candidates are included in the definition contained in that section. That section provides that a candidate shall be a person who has filed or accepted a declaration of candidacy pursuant to Section 2621 of the Elections Code. Section 2621 is as follows:

> "§2621. The declaration of candidacy by the candidate personally and the declaration of acceptance of nomination shall be subscribed and sworn to before an officer authorized to administer oaths, and at least sixty-five days before the direct primary election shall be delivered to the county clerk in the county in which the candidate resides.

> "The county clerk shall not accept such a declaration of candidacy or declaration of acceptance of nomination after 5 o'clock p.m. on the sixty-fifth day; provided, that if such day is a Saturday no declaration of candidacy or of acceptance of nomination shall be accepted after 12 o'clock noon. In counties where the office of the county clerk is legally closed on Saturday, the final day for filing shall be the preceding day at 5 o'clock p.m." (Underscoring mine)

This section is contained in Chapter 2 of Division V of the Elections Code. Chapter 2 relates solely to the direct primary election. Section 2621 makes it clear in its first paragraph that it relates solely to the direct primary election. It prescribes that the declaration of acceptance of nomination shall be delivered to the county clerk "at least sixty-five days before the direct primary election." Hence, a candidate, as defined in Section 4501 of the Elections Code, is a person who has filed or accepted a declaration of candidacy for an office to be balloted upon in a direct primary election, as stated in Section 2621 of the Elections Code.

Section 175 of the Charter, on the other hand, provides for the filing of declarations of candidacy for a general municipal election and for the offices which were balloted upon in the election of November 8, 1955. Section 175 sets out that the candidate shall himself file with the Registrar of Voters a declaration of his candidacy. There is no provision for his accepting a declaration filed by others. The form for this declaration is to be prescribed by the Registrar of Voters and shall include a statement of qualifications provided for in Section 175. This declaration is to be subscribed by the candidate before the Registrar and to be certified, dated, retained and filed by the Registrar. The declaration is to be made and filed not at least sixty-five days before a direct primary election, but, as provided by Section 175 of the Charter, "not more than fifty days before the municipal election in November."

It is clear that the "candidate" referred to in Section 175 of the Charter, that is, the candidates upon the ballot before the voters in the election of November 8, 1955, is not the "candidate" defined in Section 4501 of the Elections Code. Hence, the committees for candidates on the ballot of November 8, 1955 were not the committees defined in Section 4502 of the Elections Code, nor do the provisions relating to committees for candidates in Chapter 1 of Division VII of the Elections Code, which chapter deals with expenditures for candidates, include the committees for candidates in the municipal local election of November 8, 1955.

I am aware of my Opinion No. 89, issued December 10, 1949, covering this subject, but as I have pointed out herein, at that time there was no definition of the word "candidate" as now appears in Section 4501 of the Elections Code, and hence the law was broad enough to cover all types of elections, including general municipal elections. Since the amendments of 1955 the requirement of filing statements of campaign expenditures by committees is limited to direct primaries.

You are therefore advised that it is not necessary for the treasurer of any committee for the election of any candidate on the ballot before the voters at the election of November 8, 1955 to file a campaign statement.

Respectfully submitted,

DION R. HOLM
City Attorney

TO: THOS. A. TOOMEY
Registrar of Voters
167 City Hall
San Francisco 2

WP/BJW

Opinion No. 1030
December 21, 1955

SUBJECT: HEALTH SERVICE SYSTEM; RULE 7, SERVICE EXTENSION AND RESERVE FUND, EFFECT AS TO BILLS INCURRED CONTRARY TO ANY PLAN; SUPPLEMENT TO OPINION NO. 1003.

Dear Sir:

I have your request for opinion as follows:

REQUEST

"As a Director of the Health Service Board, and with its consent, may I refer to your Opinion No. 1003 on the subject HEALTH SERVICE BOARD, AUTHORITY TO PAY CLAIMS NOT IN ACCORD WITH ANY ADOPTED PLAN:

"At the October meeting the Health Service Board discussed the matter and approved several claims for payment from the Service Extension and Reserve Fund, upon the expressed opinion of some directors that the Health Service rules provide that the Board may use this fund at its discretion, upon a vote of two-thirds of its entire membership.

"Section 7 of the Rules, SERVICE EXTENSION AND RESERVE FUND, reads as follows:

> 'There is hereby established a Service Extension and Reserve Fund for the purpose of creating a reserve to provide for service extensions and the payment of extraordinary expenses in time of an emergency so declared by a two-thirds vote of the entire membership of the Health Service Board.
>
> . . . .
>
> 'No money shall be expended from the Service Extension and Reserve Fund except by a two-thirds vote of the entire membership of the Health Service Board.'

"May I have your opinion as to whether or not the rule as it now appears allows the Health Service Board to approve bills for services to its members over and above the benefits and limitations of Plan I, and to pay under any circumstances bills for services incurred by a member of an alternate plan of the Health Service System which were incurred contrary to the rules of said alternate plan."

OPINION

In my opinion, Section 7 of the Rules does not allow the Health Service Board to approve or pay such bills, and is invalid.

The Board has authority to adopt a plan or plans for rendering medical care to members of the System (Charter, §172.1, subd. 3(a)), and to use the funds of the System in payment of the benefits provided for in the plans. (§172.1, subd. 3(b)). Such plans, of course, apply equally to all members and entitle them to equal benefits under the same circumstances.

If the Board has more money to its account with the City Treasurer than is required to cover expenditures called for by its plans, it can invest the surplus funds in investments legal for insurance companies in California. (§172.1, subd. 4)

The moneys to the System's credit in the City Treasury are public moneys. The Board administers these moneys as a public trust. The Board has not been given power to pay out these funds on behalf of members who it feels need greater benefits than those provided by its plans.

Section 7 of the Rules is not a part of the plans, but is designed to take up where benefits under the plans leave off, and to give the Board power, at its discretion, to pay what it deems extraordinary expenses of a member during what it deems an emergency.

Payments under Section 7 would not be a matter of right, but of grace. Although all members pay the same semi-monthly contribution to the System and should be entitled to the same benefits, the application of Section 7 might result in inequality of treatment of different members under the same circumstances because payments under that section are a matter of discretion.

The Charter does not give the Board power to pay out its funds under the circumstances outlined in Section 7. The Board's effort to confer such power on itself by adoption of a rule is abortive. The only rules it has been authorized by §172.1 to adopt are those (1) for "the transaction of its business," and (2) for "the granting of exemptions and the admission to the system of persons who are hereby made members thereof and such other officers and employees as may voluntarily become members of the system with the approval of the board." (§172.1, subd. 3(c)).

A rule (Section 7) providing for the giving away of the System's funds in what it from time to time may feel are emergency cases is not authorized by Charter §172.1, subd. 3(c) or by §19(a).

Power in a public board to expend public funds must be conferred "in clear and unmistakable language." (Mines v. Del Valle, 201 C. 273, 287.) Only "clear warrant of law" will justify expenditures of public funds and any doubt must be resolved against the expenditure. (Tracy v. County of Fresno, 125 C.A. 2d 52, 60-61). Powers of public bodies must be strictly construed and any fair, reasonable doubt resolved against the existence of the power. (Harden v. Superior Court, 44 C. 2d 630, 641). This is so, irrespective of how worthy is the end in view. Worthy motives cannot confer power. As said in Egan v. San Francisco, 165 C. 576, 580: "But, however worthy the motive, however advantageous to the public the result sought to be attained, it must always be remembered that municipal corporations are public bodies of limited powers, and that the validity of their acts must be judged by an examination of the charter or law defining their powers, rather than by a view of the purposes or results of those acts."

You are therefore advised that Section 7 of the Rules is a nullity and does not allow the Board to approve bills for services over and above the limitations of Plan I, or to pay under any circumstances bills for services incurred by a member of an alternate plan contrary to the terms of said alternate plan.

Respectfully submitted,

DION R. HOLM
City Attorney

GEB/WFB

To: Mr. Daniel J. Galvin
Director, Health Service Board
61 Grove Street
San Francisco 2.

OPINION NO. 1031

December 22, 1955

SUBJECT: MUNICIPAL RAILWAY, S102 CONDUCTOR AND S104 MOTORMAN AS POSITIONS REQUIRING EXPERT OR TECHNICAL TRAINING UNDER CHARTER SECTION 7; RESIDENCE REQUIREMENTS OF EMPLOYEES, WAIVER OF

Dear Sir:

You have requested an opinion of the City Attorney as follows:

REQUEST

> "Section 7 of the Charter provides that 'positions requiring expert or technical training may, on the recommendation of the department head and the mayor, and with the approval of the civil service commission and the board of supervisors, be exempted from the requirements of this section.'
>
> "There may be a question as to whether the classes involved meet the qualification 'requiring expert or technical training.'
>
> "It is respectfully requested that you render an opinion to determine whether the residence requirements for the classes S102 Conductor and S104 Motorman may be waived under the provisions of Section 7 of the Charter."

OPINION

Inasmuch as vacancies in the position S106 bus operator are filled from the list of eligibles established from examinations for the positions S102 conductor and S104 motorman, the following remarks are intended to apply as well to the bus operator position. My remarks are not to be construed in any sense as derogatory of the subject positions. These occupations are among the most difficult in our urban society and, by and large, the municipal railway men perform their functions exceptionally well under the vexing conditions of modern traffic.

The second sentence of Charter Section 7, in part, provides:

> "All employees of the city and county shall be citizens, and shall have been residents thereof, for at least one year prior to the appointment, unless otherwise specifically provided in this charter, and members of the fire and police departments shall be citizens and shall have been residents of the city and county for at least five

> years next preceding appointment, and every elected officer, member of any board or commission and employee, including members of the fire and police departments, shall continue to be a resident of the city and county during incumbency of office or employment, and upon ceasing to be such resident, shall be removed from office or employment . . . provided, also, that positions requiring expert or technical training may, on the recommendation of the department head and the mayor, and with the approval of the civil service commission and the board of supervisors, be exempted from the requirements of this section."

The words "expert or technical training" standing by themselves are incapable of precise definition and could be broadly construed to include almost any degree of training giving a person some skill or ability. For example, Webster's New International Dictionary, Second Edition, Unabridged, of 1948, gives these definitions as far as applicable:

Expert (adj.) "1. Taught by use, practice, or experience; having facility of operation or performance from practice; knowing and ready from much practice; clever; skilful; as, an expert surgeon, expert in chess or archery. 2. Involving or displaying special skill or knowledge; also, of or pertaining to an expert; as expert advice; an expert solution."

Expert (noun) "1. An expert or experienced person; one instructed by experience; hence, one who has special skill or knowledge in a particular subject, as a science or art whether acquired by experience or study; a specialist; . . . "

Technical "Of or pertaining to the useful or mechanic arts, or any science, business, profession, sport or the like; specially appropriate to any art, science, business, or the like; as, technical training, problems, skill, words."

Training " . . . the course followed by one who trains or submits to being trained . . . "

The official bulletin published by the San Francisco Civil Service Commission and announcing a limited tenure examination for positions S102 conductor and S104 motorman, and stating that position S106 bus operator will be filled by assignment from the list of eligibles established "from the examination," states the minimum requirements for the positions, as follows:

"MINIMUM REQUIREMENTS: Three months of first-class paid experience within the last five years in the operation of busses, street cars, motor coaches, and/or heavy motor vehicle equipment; and the possession of a current valid operator's license issued by the Department of Motor Vehicles of the State of California. The license must be presented at the offices of the Civil Service Commission at the time of filing the application.

"NOTES: (1) Before assignment to the duties of Bus Operator eligibles will be required to obtain a chauffeur's license.

(2) In calculating the period of time within which experience must have been had, service in the armed forces will be excluded unless such service clearly included qualifying experience as stated above.

"SPECIAL REQUIREMENTS: At the time of filing the application applicants must present acceptable evidence of reasons for rejection by the armed services or for medical discharge from the armed forces."

It is to be noted that there is no requirement of expert training or any other reference to the quality of training. Under a broad interpretation there is implied in the requirement of three months* of first-class paid experience within the last five years in the operation of buses, etc., and of the possession of a current valid operator's license issued by the Department of Motor Vehicles of the State of California, some slight degree of technical training.

Broad construction permitting a slight degree of technical training to satisfy the Charter requirements would, however, encompass the technical training required in some measure for most of the positions filled by employees of the city and county.

---

* The requirement is increased to six months experience in the case of the examination for permanent appointment to the subject positions.

But it does not therefore follow that all positions requiring technical training in some degree come within the phrase "positions requiring expert or technical training," in view of the balance of the sentence in which those words are found. The opening clauses of the sentence are a positive statement of law, clear and unambiguous, that employees of the city and county shall be residents of the city and county. Following the statement of the residence requirement appear a number of provisos and exceptions, including the one with which we are here concerned. To give this exception the broad construction made possible by the loose definitions involved in "expert or technical training" violates a controlling rule of construction, which is, that no exception or proviso should be so construed as to destroy the main provisions of the sentence or statute being construed. The construction of a sentence or proviso should be adopted that is consistent with and not repugnant to the body of the sentence or act being construed. (50 Am. Jur., Statutes, Sec. 440). And to construe the Charter as permitting positions S102 conductor and S104 motorman to come within the subject exceptions would mean that the vast majority of city and county positions would also come within the exception.

It is therefore my opinion that the framers of the Charter had in mind, in creating an exception to the residence requirements for persons filling "positions requiring expert or technical training," those positions requiring some more advanced degree of expert or technical training than is required in the case of motormen, conductors and bus operators.

You are so advised.

Respectfully submitted,

DION R. HOLM
City Attorney

MMD/BJW

To: Honorable Elmer E. Robinson
Mayor
200 City Hall
San Francisco 2

OPINION NO. 1032

December 23, 1955

SUBJECT: REDEVELOPMENT AGENCY: VALIDITY OF AGREEMENT WITH TO APPLY FOR ZONE CHANGE AND, IF GRANTED, TO APPLY FOR CHANGE BACK AFTER CERTAIN CONSTRUCTION PERMITTED UNDER THE FIRST CHANGE OF ZONE.

Dear Sir:

I am in receipt of your request for an opinion as follows:

REQUEST

"Adolph Hansen and Grace Hamilton, the owners of Lot 3, in Block 1097 in Assessor's Block Book, situated on the northwest corner of Broderick and O'Farrell Streets, have filed an application to rezone said property from second residential to commercial use.

"This rezoning is proposed in order that Hansen, et al, may enter into a lease with Boas Pontiac so that the property rezoned can be used for parking lot purposes by Boas Pontiac.

"This parcel is within the boundaries of the Western Addition Redevelopment Project and in the plan for this project, it is proposed that the property be used for second residential purposes.

"In order that the Agency may be protected both in the acquisition of the property and the price to be paid therefor, the following procedure has been proposed:

"1. Owner Hansen, et al, will stipulate with Agency that the market value will be based on second residential zoning. He will also stipulate that the lease will be a year to year lease and will terminate upon acquisition of the property by the Agency. He will also stipulate that any improvements made to the land will not be reflected in the purchase price.

"2. Owner Hansen, et al, has filed a second application with the Planning Commission requesting a reclassification from commercial to second residential.

"3. This case will be set for hearing by the Planning Commission after action is taken on the first application, supposedly three months, in order that parking lot construction may be completed.

"4. The Planning Commission takes up the First application.

"(a) Hansen stipulates character of development to be for commercial use, limited to such improvements as will make it suitable for automobile parking for the sole use of Boas Pontiac.

"(b) If City Planning reclassifies, it would be subject to the stipulations contained herein.

"5. Boas Pontiac installs parking lot use.

"6. City Planning then hears application to reclassify to second residential.

"(a) Owner must have agreed not to oppose.

"(b) Redevelopment Agency advocates change on the basis of the Western Addition Final Plan.

"7. When and if this is approved, the property becomes second residential, but parking lot use continues as legal non-conforming use which may not be enlarged, i.e., no commercial buildings may be built.

"Will you kindly render the Redevelopment Agency an opinion as to whether the above outlined procedure is legal."

OPINION

Inasmuch as your Agency may in the future be confronted with many requests by property owners for special consideration involving zoning matters in redevelopment areas, and so that the Agency may be guided in its deliberations, I shall generally discuss the powers of the Planning Commission in accepting stipulations in the reclassification of property before answering your specific request.

Sections 47 and 48 of the City Planning Code (Part II, Chapter II, Article 2, of the San Francisco Municipal Code) provide as follows:

"SEC. 47. Stipulations. The City Planning Commission, in acting on any application for reclassification of property or for the establishment or change

> of building set-back lines, may accept stipulations in writing from the applicant or applicants should said requested reclassification or change be granted, as to the character of the improvements which will be placed on said property. Said stipulation shall be filed with the Commission, and any change in classification or set-back lines affecting said property may be made contingent upon the conditions contained on said stipulations being observed by the applicant or applicants or by his or their successors in interest, and said conditions shall be included in any resolution or order reclassifying said property or changing set-back lines thereon, and said reclassification or change shall at all times be and remain contingent upon the observance of said conditions, and no improvements shall be constructed thereon in violation of said conditions."
>
> "SEC. 48. Time Limit - Reversion. The City Planning Commission, in reclassifying any property or changing or establishing building set-back lines thereon, shall provide in any resolution or order reclassifying said property, or changing said set-back lines thereon, that said property so reclassified or changed shall be used for the purposes for which it was reclassified or changed, within a specified period of time, and that the failure to use the same for said purposes shall cause said property to revert to the zone or classification from which it was changed."

In my opinion No. 367, dated May 2, 1951, involving the power of the City Planning Commission to accept stipulations as to the character of improvements in connection with reclassification of property and providing for automatic reversion to its former classification in the event condemnation proceedings were instituted under the Redevelopment Law, I advised as follows:

> "The City Planning Commission has only such power in accepting stipulations from an applicant, as a condition to the rezoning of property, as has been specifically delegated to it by the Board of Supervisors. (See Allen v. McKinley, 18 Cal. (2) 697, 705 where the court said 'such commissions have only such powers as are conferred upon them.')
>
> "It will be noted that under Section 47 of the City Planning Code (supra) the City Planning Commission in granting an application for the rezoning of property may accept stipulations in writing from the applicant should the Commission grant the requested reclassification or change, as to the character of the improvements

which will be placed on the property. The section further provides that the reclassification shall remain contingent upon the observance of the conditions agreed upon by the applicant and that no improvements shall be constructed in violation of said conditions. Section 47 of the City Planning Code (supra) is the only section authorizing the City Planning Commission to reclassify property subject to conditions agreed upon by the applicant, and the only conditions which may be required of the applicant under said Section 47 are as to the character of the improvements which will be placed on the property. There is no provision in the City Planning Code (supra) or in any ordinance or statute, which would authorize the City Planning Commission to exact any other agreement from the applicant as a condition to the reclassification of property. There is also no provision in the City Planning Code (supra) or in any other ordinance or statute, which would authorize the Commission to require the applicant to agree that should the property after reclassification be subject to condemnation proceedings, that the parcel would thereupon revert to its prior classification.

. . . .

"Section 48 of the City Planning Code (Part II, Chapter II, Article 2, San Francisco Municipal Code) authorizes the City Planning Commission to provide in any resolution or order reclassifying property that the said property shall be used for the purposes for which it is reclassified within a specified period of time, and that the failure to use the same for said purposes shall cause the property to revert to the zone or classification from which it was changed. This is the only provision authorizing the City Planning Commission to provide for an automatic reversion of property to the zone from which it was reclassified. The City Planning Commission has therefore no power to provide for the automatic reversion of the zone of real property other than is authorized by said section 48.

. . . .

"The authority of the City Planning Commission to accept voluntary stipulations from an applicant is governed by Section 47 of the City Planning Code, supra, and is limited to stipulations 'as to the character of the improvements which will be placed on said property.' The scope of the power of the City Planning Commission under this provision must be viewed in the light of the purposes of the zoning law and only such stipulations as are within the purposes of the zoning ordinance generally may be accepted.

> "Your request here is based upon the possibility that at some uncertain date in the future an area of the City may be acquired by a public agency through eminent domain, and your thought is therefore to regulate by voluntary stipulation under Section 47 of the City Planning Code the type of improvements to be placed thereon so as to keep the amount of money which may have to be paid by the public agency at a future date for the acquisition of said land at a minimum. While the idea of the City Planning Commission in this regard is commendable, the scope of its power cannot be governed by this desired end, but must be limited by the general purposes of the zoning law.
>
> "With this in mind, it is my opinion that the power of the City Planning Commission to accept stipulations as to the 'character of the improvements' as a condition to granting a change of classification, would authorize the Commission to accept stipulations as to the story height and the type of construction (Class A, etc.). These matters are definitely within the scope of regulating the 'character of improvements.'"

On March 16, 1944, my predecessor, Mr. John J. O'Toole, had occasion, in Opinion No. 3564, to interpret the legality of the practice of the Planning Commission of deliberately creating non-conforming uses in certain areas where such uses were in the opinion of the Commission not degradatory to the district and without creating a spot zone with uncontrolled use for all time. In this opinion it was pointed out that the zoning ordinance had express provisions for eliminating "non-conforming uses" as quickly as possible. (Sec. 9, Art. 1, Chapt. II, Part II of the San Francisco Municipal Code.)

The spirit of our zoning ordinance, as well as others throughout the land, is to restrict and eliminate "non-conforming uses, not to increase or deliberately create them." Wilson v. Edgar, 64 Cal. App. 654.

In my opinion No. 413 dated August 2, 1951, I advised that Section 47 of the City Planning Code authorizes the City Planning Commission to accept stipulations as to the "character of the improvements" to be placed on the property. No authority is granted in said section or in any other section of the City Planning Code to the City Planning Commission to exact or accept stipulations as to the use to which the property is to be placed.

Also, in my opinion No. 36, dated June 24, 1949, I advised, "Any designation of the particular use on the application for a change in zoning classification cannot be considered as a stipulation on the part of the applicant that the property will be used solely and always for the particular use designated. The ruling of

the Commission must either approve or disapprove the proposed change in zoning classification and if approved the property may thereafter be put to any use permitted in the new zone classification."

With reference to your specific request as to whether the procedure outlined above is legal, you are advised as follows:

1. The owners of the property, Mr. Hansen, et al., may enter into an agreement with the Agency in consideration of the Agency not opposing their application to rezone the property from second residential to commercial, that the market value of the property when acquired by the Redevelopment Agency shall be determined on the basis of the usage as second residential, that any improvements made to the land will not be reflected in the purchase price and that the lease referred to will be on a year to year basis and shall terminate upon the acquisition of the property by the Agency. In this connection, you are cautioned that any such agreement will only be binding upon Mr. Hansen, et al, the owners of the property, and will not be binding on any purchaser of the property from Mr. Hansen, et al., in the event they should dispose of said property.

2. In acting upon the application of Mr. Hansen, et al., to rezone the property from second residential to commercial use, the Planning Commission must consider and determine the matter on the basis of all the facts before it.

As stated herein, Section 47 of the City Planning Code authorizes the Planning Commission to accept stipulations in writing as to the character of improvements which will be placed on the property. No authority is granted in said section which would authorize the City Planning Commission to exact or accept stipulations as to the use to which the property is to be placed. Consequently, the City Planning Commission could not accept a stipulation that the property, if reclassified, is to be used solely as a parking lot for the Boas Pontiac Company. Certain stipulations as to the character of improvements may be accepted, the nature of which would prevent the property from being used for any other purpose but parking.

3. It appears that the steps as outlined in your numbered paragraphs 2, 3, 5, 6, and 7 contemplate that the second application to reclassify the property from commercial to second residential would be filed at the same time as the first application to reclassify the property from second residential to commercial, or in any event before the first application is acted upon. There is no authority in the Planning Code which would permit the acceptance by the Planning Commission of such second application until the first application had been acted upon. The Planning Commission may only accept an application to reclassify property from the presently existing district. In addition it appears from the steps as outlined that the Planning Commission would be committing themselves beforehand as to the outcome of the action to be taken by such

Commission before or at the time an application has been filed. Such commitment would be improper. The Commission should make no determination on an application for reclassification of property until all of the facts and evidence have been presented at the hearing on said application.

However, there is nothing in the City Planning Code which would preclude the owner, after the first application has been approved and the improvements constructed, from filing a second application to rezone the particular parcel in question from commercial to second residential. I should point out to you, though, that there is no way in which the owner in advance can be committed to the filing of the second application. If such second application is in fact filed, the City Planning Commission would then have to consider the said application on its merits and determine its action accordingly. As pointed out above, the City Planning Commission could not, in advance of the hearing of the said application, commit itself to act upon it in any particular manner.

You are advised accordingly.

Respectfully submitted,

DION R. HOLM, City Attorney

TO: EUGENE J. RIORDAN, Director,
Redevelopment Agency of the
City and County of San Francisco
512 Golden Gate Avenue, San Francisco 2

MG/LSM

Opinion No. 1033
December 30, 1955

SUBJECT: ELIMINATION OF EXISTING OFF-STREET PARKING SPACE, EFFECT OF ORDINANCE NO. 9391.

Dear Sir:

Your request is before me as follows:

REQUEST

> "The Department of City Planning would appreciate your opinion as to whether Ordinance No. 9391 can be interpreted to prohibit the elimination of an existing off-street parking space.
>
> "The department is in receipt of a Building Application No. 180727 which the applicant proposes to eliminate the existing off-street parking space in a one family dwelling and use this parking space for an office.
>
> "The premises are located in a Commercial District."

OPINION

It is my opinion that Ordinance No. 9391 may not be interpreted to prohibit the elimination of an existing off-street parking space.

The plain language of the ordinance is that its requirements are to apply only to "dwelling units hereafter constructed." The proposed construction here involved is an office and may not be construed as a "dwelling unit," under the definition given that phrase in the ordinance.

You are therefore advised accordingly.

Respectfully submitted,

DION R. HOLM
City Attorney

RJR:TJB

To: Mr. Paul Opperman
Director of Planning
100 Larkin Street
San Francisco 2, California

APR 2 - 1956